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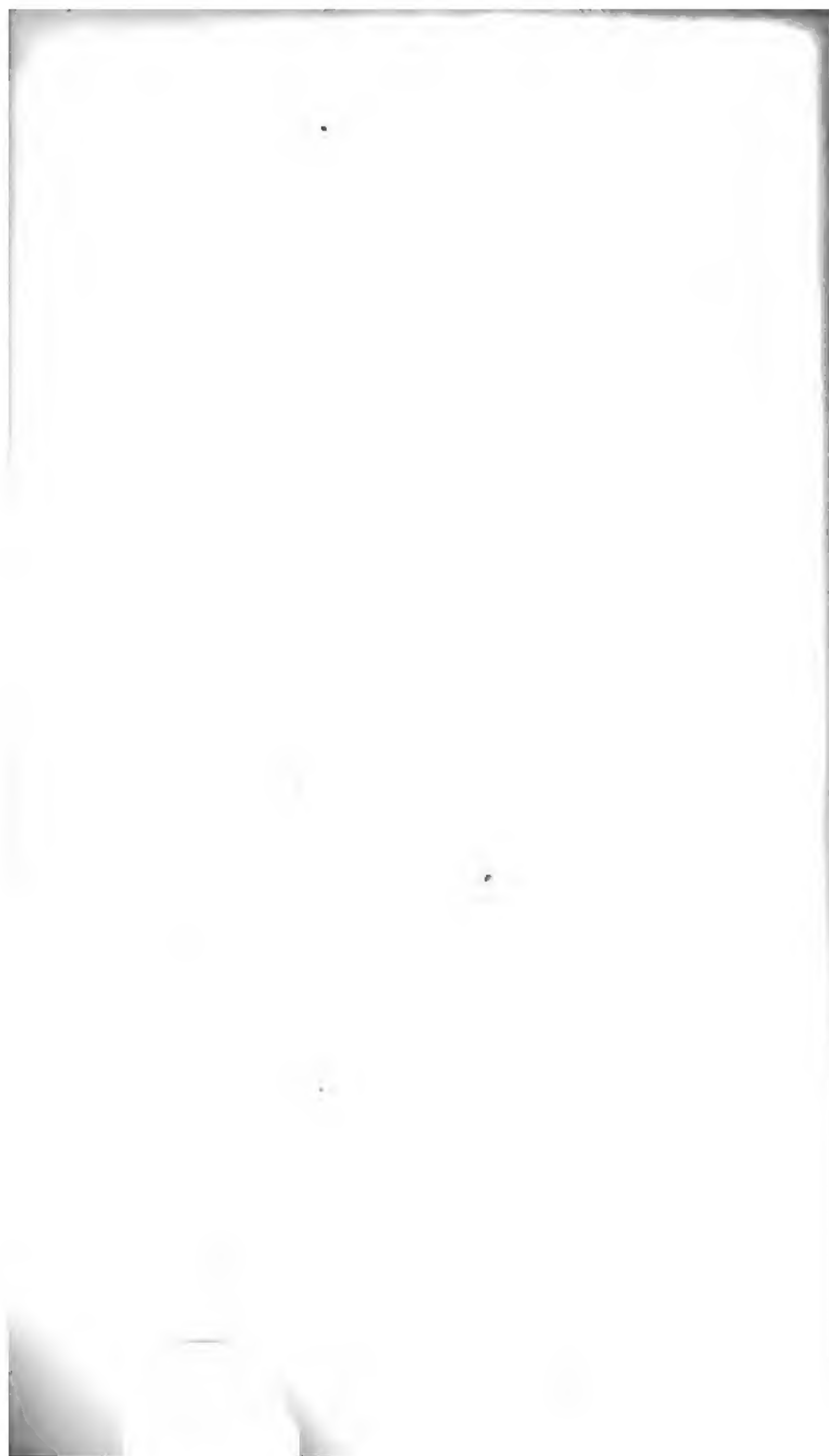
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P. V. Gifford



THE
LAW OF NEGLIGENCE
IN
PENNSYLVANIA

By
WM. HARDCASTLE BROWNE, A. M.
OF THE PHILADELPHIA BAR

Author of a Commentary on the Law of Divorce and Alimony
An Edition of Blackstone's Commentaries on English Law
and an Edition of Kent's Commentaries on
American Law, etc.

IN TWO VOLUMES

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Landlord and Tenant—Continued.

were untenantable to avoid the payment of rent. *Kline vs. Jacobs*, 68 Pa., 57. 7. If nothing be said about repairs in the lease, the tenant is bound to keep the premises in repair. He is not bound to make permanent repairs, but if he does so he cannot recover for them. *Long vs. Fitzimmons*, 1 W. & S., 532. 8. If there is no covenant for repairs, a landlord is not liable for defects known to the lessees at the time of the letting. Where there is no obligation to repair, a subsequent promise to do so without consideration cannot be enforced. *Lutz vs. Haley*, 10 Montgomery Co., 18. *Lukens vs. Hedley*, 1 W. N., 266. *Walz vs. Rhodes, Idem*, 49. 9. There is no implied obligation on the landlord to repair; nor does he undertake that the premises are fit for the purpose for which they are rented, that they are tenantable or shall continue so. The rule, *caveat emptor*, applies in leases. A landlord voluntarily making repairs to prevent dilapidation, is not evidence from which an inference can arise that there was a contract to repair. *Moore vs. Weber*, 71 Pa., 429. 10. It is no defence to a landlord's claim for rent, that the premises were so damaged by fire as to be untenantable, and that the landlord made no effort to restore them to their primary condition. The law implies no such duty, unless imposed upon him by the lease. The lessee must in such case pay the rent, even though the building has been consumed. The law is different, if the premises leased be but a part of the whole building. *Phillips vs. Epp*, 9 Lancaster Review, 197. 11. Where a tenant holds and enjoys demised premises, the failure of the landlord to carry out his covenant to repair and make additions will not defeat the rent *in toto*, or discharge the tenant from liability for rent, unless the building was worthless for the purpose for which it was rented without such additions and repair. If any damages occurred to the tenant by reason of such non-performance on the part of the landlord, the tenant is entitled to have them deducted from the rent due, and if in excess, to a verdict. *Prescott vs. Otterstatler*, 85 Pa., 534. 12. No implied covenant that the landlord warrants the leased premises to be tenantable, or that he undertakes to keep them

Landlord and Tenant—Continued.

so, arises out of the relation of landlord and tenant, and in the absence of a provision in the lease that the lessor shall repair, it is no defence to an action for the rent, that the demised premises are not in a tenantable condition. *Reeves vs. McComeskey*, 168 Pa., 571. *Schleppi vs. Gindele*, 14 W. N., 31. *Thompson vs. Flinn*, 33 Pittsburg Journal, 242. *Tennery vs. Drinkhouse*, 2 W. N., 210. *Wheeler vs. Crawford*, 86 Pa., 327-13. In the absence of any contract on the subject, or stipulation in the lease, the tenant is bound to do all repairs and keep the premises in tenantable order at his own expense. It is the tenant's duty to remove temporary obstructions from drains, spouts and waterpipes. Where a landlord, bound to repair by his contract, neglects to do so, and in consequence the premises become untenable, the tenant has a right to leave, and may set off the actual damage against the claim for rent. *Russell vs. Rush*, 2 Pittsburg, 134. 14. Ordinary repairs must be made by a tenant unless he covenants otherwise, but that which is extraordinary ought to be paid by the landlord, and not by the tenant. A landlord is bound to keep the privy of a demised premises in good condition. *Scheerer vs. Dickson*, 7 Phila., 472. 15. In an action against a tenant for arrears of rent, evidence was not admitted to show that the premises were badly out of repair and that the roof leaked. *Stull vs. Thompson*, 154 Pa., 43. 16. Though the tenant is bound, where there is no agreement to make repairs, to make such fair and ordinary repairs as putting in windows, etc., that have been broken by him, so as to prevent decay of the premises, yet he is not required to make substantial and permanent repairs, such as new roofing, nor to make general repairs, nor restore the buildings if burnt down or become ruinous by accident, without any default on his part. *Weber vs. Moore*, 3 Lancaster Bar, No. 15.

LX. NEGLECT TO RETAIN OCCUPANCY. 1. A landlord may receive the key of the premises without interfering with the occupancy by the tenant. He is not bound to let the premises suffer, but may take possession in order to take care of them.

Landlord and Tenant—Continued.

Bradley vs. Brown, 6 W. N., 282. 2. The removal of the tenant and an unaccepted offer to deliver up the keys is no evidence of an agreement to terminate the lease. *Kiester vs. Miller*, 25 Pa., 481. 3. Where a tenant leaves in the middle of his year, sending the key to the landlord, and notified him he would hold him for the rent, the landlord may rent the house, holding the former tenant for the rent to that date. *Marseiller vs. Kerr*, 6 Wh., 500. 4. Open, notorious and exclusive possession taken and maintained by the landlord would be a sufficient acceptance of a surrender by the tenant. *Penn vs. Auer*, 6 W. N., 447.

LXI. NEGLECT TO RETAIN TITLE TO PREMISES. The title of a stranger, not claiming by or under the lessor, cannot be brought in question by a tenant, unless the landlord's title has come to an end by his own act or been divested by the act of the law. Though the tenant is not permitted to show that his lessor never had title, he may prove that his interest has expired and become vested in another. *Mohan vs. Butler*, 112 Pa., 597.

LXII. NEGLECT TO SURRENDER PREMISES. The measure of damages in an action by a landlord against a tenant for breach of covenant to surrender the premises at the end of the term, is the annual value of the premises. *Russell vs. Killion*, 7 Phila., 110.

LXIII. NEGLECT TO VACATE. 1. Where a tenant holds over after the expiration of his term, without objection from the lessor, the tenancy is subject to all the covenants contained in the previous lease. *Betz vs. Delbert*, 16 W. N., 360. *Sharpless vs. Weigle*, 7 W. N., 376. 2. Where the lessee remains in possession after his term is ended, it is optional with the lessor to treat him as a trespasser or as a tenant. A lessee may waive the three months' notice to quit required by statute. *Kaier vs. Leahy*, 15 Pa. County, 243. 3. Where a tenant holds over after the expiration of a sealed lease, the landlord's claim is for use and occupation, and the lease is not the foundation of the claim, but only evidence of its amount. *Petroleum Co. vs. Logan*, 6 W. N., 502.

Land Office.

NEGLECT TO PROCURE A SURVEY. One guilty of laches in not endeavoring to procure a survey on his application in the land office shall be postponed. *Cherry vs. Robinson*, 1 Y., 521.

Larceny.

NEGLECT TO PROVE. Larceny is the felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker. Where the owner parts with the custody of his property, and not with the possession, and the defendant converts the chattel to his own use, it is larceny, although he had no felonious intent at the time he received it. *Comm. vs. Hutchinson*, 2 Parsons, 389.

Lease.

I. NEGLECT BY ALTERATION. Where a lease has evidently been altered in a material point, it should not be admitted in evidence, until some testimony be offered explanatory of the alteration. *Burgwin vs. Bishop*, 91 Pa., 336.

II. NEGLECT BY ASSIGNING. 1. A lease contained a covenant that the lessee should not assign the lease. The lessee, with the consent of the lessor, did assign it. Held, a surety to the lease was thereby discharged. *Bedford vs. Jones*, 5 Legal Opinion, 90. 2. Where a clause in a lease prohibits the transfer thereof by lessee under penalty of forfeiture, the mortgaging of the leasehold by the lessee will constitute a sufficient ground of forfeiture. *Becker vs. Werner*, 98 Pa., 555.

III. NEGLECT IN DURATION. 1. A lease for no determinate length of time is a lease for one year. *Knoll vs. Jones*, 3 Lancaster Review, 152. 2. Leases of doubtful duration must be construed favorably to the tenant. In all cases of uncertainty the tenant is more favored by the law. *Comm. vs. Sheriff*, 3 Brewster, 537. *Henry vs. Wilson*, 1 W. N., 506.

IV. NEGLECT IN EXECUTING. A lease executed by an agent without any written authority from the lessor, has

Lease—Continued.

the force and effect of a lease at will. At the most, such a lease may be considered as running from year to year, and is terminable at the end of any year at the will of either party. *Loran's Estate*, 29 W. N., 115. 20 *Phila.*, 174.

V. NEGLECT BY INTERLINING. An interlineation of certain words in a lease, so as to make it conform to the understanding of the parties at the time of its execution, is not a fraudulent alteration or forgery. *Pauli vs. Comm.*, 89 Pa., 432.

VI. NEGLECT IN INTERPRETING. Where the wording of a lease is so indefinite as to raise doubts as to its true meaning, the rule is to interpret it liberally for the lessee. *Trout's Appeal*, 24 *Pittsburg Journal*, 133.

VII. NEGLECT IN MAKING. A parol agreement between a landlord and a tenant in possession for a lease of the property for a term of three years commencing one year after the date of the agreement, is void under the statute of frauds. The fact that the tenant made certain improvements in view of such lease, does not create a sufficient equity to take the case out of the operation of the statute. *Whiting vs. Opera House Co.*, 88 Pa., 100.

VIII. NEGLECT IN THE RECORD. A record which fails to set forth the terms of the lease, the amount of rent and other facts, is fatally defective. *Tyrell Building Ass'n vs. Daughen*, 7 W. N., 244.

IX. NEGLECT IN REPRESENTATIONS. If a landlord, in making a lease, falsely allege that certain property is part of the demised premises, knowing that it is essential to the tenant's business, the latter may rescind the contract. *Morris vs. Shakespeare*, 35 *Pittsburg Journal*, 496. *Lockwood vs. McNamara*, 6 W. N., 367.

X. NEGLECT IN SIGNING. A lessor signed as "agent," disclosing no principal, the tenure being under the lessor, the lessee could not contest his title. *Bedford vs. Kelly*, 61 Pa., 491.

XI. NEGLECT OF AUTHORITY TO MAKE. A lease made

Lease—Continued.

by certain officers of a corporation, unauthorized so to do, will be declared invalid. Mere silence will not be construed to be acquiescence. *Kersey Oil Co. vs. R. R.*, 12 Phila., 374.

XII. NEGLECT TO CARRY OUT PROVISIONS. A clause of forfeiture inserted in a lease, and intended for the benefit of the lessor, can be invoked by the lessor only. *Wills vs. Gas Co.*, 37 *Pittsburg Journal*, 139.

XIII. NEGLECT TO COMPLY WITH CONDITIONS. Where the lessor has acquiesced in the breach of covenant by accepting rent subsequently due, he must give notice of his intention to enforce the strict performance of the covenant before he can take advantage of a clause of forfeiture. *Oliver vs. Brophy*, 18 W. N., 427.

XIV. NEGLECT TO CONTINUE. A farm lease terminates with the death of the tenant. *Jaquette's Estate*, 1 *Chester Co.*, 197.

XV. NEGLECT TO DELIVER. Where a lease was prepared and signed by the lessee and his surety, but not signed at the time by the lessor, nor at any time in the presence of the lessee, nor delivered to him, and the premises were never taken possession of by the lessee, nor rent paid, held, that delivery was as necessary on the part of the lessor, even though he should retain possession of the lease, as it was on the part of the lessee. *Kelsey vs. Tourtelotte*, 59 *Pa.*, 186.

XVI. NEGLECT TO OCCUPY PREMISES. Under the statute of frauds, a parol contract to lease premises for more than three years is void. Damages cannot be recovered for the loss of the bargain; but if the landlord so altered his premises as to unfit them for ordinary purposes or put unnecessary improvements upon them at the request of the other party, he might recover for such expense. *Sausser vs. Steinmetz*, 88 *Pa.*, 324.

XVII. NEGLECT TO RECORD. Leases for years, under twenty-one years, accompanied by possession, need not be recorded, nor assignments of such. A lease for years is the subject of levy and sale on *feri facias*. *Williams vs. Downing*, 18 *Pa.*, 60.

Lease—Continued.

XVIII. NEGLECT TO RESCIND. 1. The declaration of a landlord that a tenant has given up his lease, accompanied by an unsuccessful attempt to lease to another, is not conclusive evidence that the relation of landlord and tenant has ceased. There must be an agreement to rescind, or the lease continues in force. *Milling vs. Becker*, 1 **York Record**, 205. 2. Mere removal of a tenant with an unaccepted offer to deliver the key is not evidence of the termination of a lease. Taking care of the key and cleaning the windows of a house after the tenant had left, are not conclusive evidence of the landlord's acceptance of a surrender. *Milling vs. Becker*, 96 **Pa.**, 182.

XIX. NEGLECT TO SIGN. 1. If a lessee who has not signed the lease, accepts it when signed and sealed by the lessor, the lease binds him the same as if he had executed to it. *Carnegie Gas Co. vs. Philadelphia*, 158 **Pa.**, 317. 2. The omission of a lessee to sign a lease frees from liability a surety who has signed. *Cooney vs. Biggerstaff*, 34 **Pittsburg Journal**, 381.

Legacy.

I. NEGLECT BY DUPLICATING. Where a legacy is given by a will, and by a codicil another legacy is given to the same person, the second is deemed as additional to the first, unless a contrary purpose is distinctly manifested by the instruments themselves. *Brisben's Appeal*, 1 **Lancaster Bar**, No. 19.

II. NEGLECT IN DEMANDING. The burden of proof lies on the legatee after twenty years from the time the legacy was demandable; prior to that time the *onus* is upon the person resisting payment. *Bentley's Estate*, 8 **W. N.**, 455.

III. NEGLECT IN LANGUAGE OF A BEQUEST. Should a testator, in his will, merely say, "I desire A. B. to have one thousand dollars," it would be as effectual a legacy as if he was to expressly direct it." *Burt vs. Herron*, 66 **Pa.**, 402.

IV. NEGLECT IN NAME OF LEGATEE. 1. Where two parties claim a legacy, neither of whom bears the name of the legatee in the will, and it is uncertain which is the one intended by

Legacy—Continued.

the testator, if either, it must be determined by a consideration of all the language used, and by proof of facts and surrounding circumstances. *Washington University's Appeal*, 111 Pa., 572.

2. Names of legatees may be supplied to effectuate the intention of the testator. *Robinson's Estate*, 10 Lancaster Bar, 2.

V. NEGLECT IN PURCHASING. A residuary legatee, the wife of an executor, in the absence of fraud, may purchase, through the medium of her husband, acting as her agent, the share of another residuary legatee. The rule which prohibits a trustee from buying at his own sale, has no application to such case. *Dundas' Estate*, 136 Pa., 318.

VI. NEGLECT IN REVOKING. Lead pencil lines drawn through a legacy by the testator, when the will is written in ink, is a revocation of such legacies. Precisely the same effect is to be given to writings in lead pencil as to those written in ink. *Tomlinson's Estate*, 7 Lancaster Review, 149.

VII. NEGLECT OF LEGATEE. 1. Though a legatee may release or renounce a legacy, and thus become a competent witness to prove a will, yet he cannot make himself competent by assigning his interest to another. *Haus vs. Palmer*, 21 Pa., 296. 2. A legatee who has received his legacy, and afterwards concludes to contest the will, may return the legacy to the executors, otherwise he is barred by the rule that forbids him to take under the will that which the testator gave him, and at the same time deny its validity as to others. *Miller's Estate*, 166 Pa., 97.

VIII. NEGLECT TO BEAR INTEREST. 1. The rule that interest upon legacies does not commence to accrue until one year after the death of the testator, gives way at all time to the testator's intent. *Flickwir's Estate*, 136 Pa., 374. 2. As a general rule, a legacy bears no interest until the time it becomes payable by the terms of the bequest. An exception exists, where the legacy is to a minor child of the testator, who has no other means of support. *Kerr vs. Bosler*, 62 Pa., 187. 3. When a testator bequeaths a sum of money and fixes the time of payment, he determines by that act the precise sum to be

Legacy—Continued.

paid at the time fixed by him. The only exception is where the law infers an intention to pay interest from the relation in which the testator stands to the legatee. *Page's Appeal*, 71 Pa., 404. 4. As a general rule, pecuniary legacies do not bear interest until they are payable, *i. e.*, until one year after the testator's death. Where, however, such legacy is made in trust to apply the income to the support of the legatee, such legacy bears interest from the date of the testator's death. So a legacy of interest-bearing securities. *Townsend's Appeal*, 106 Pa., 269.

IX. NEGLECT TO CLAIM. Where a legacy is dependent upon the legatee applying personally for it, and if uncalled for within five years to become part of the residuary estate, held, that no personal application having been made by the legatee, who died within the five years, his administrator was not entitled to the money, but passed it into the residuary estate. *Stover's Appeal*, 77 Pa., 282.

X. NEGLECT TO DELIVER. A specific legatee will take nothing, if the thing bequeathed be adeemed by the testator in his lifetime. General legacies will abate proportionably, if there be not assets to pay them in full. *Cascaden's Estate*, 8 Phila., 582.

XI. NEGLECT TO FURNISH REFUNDING BOND. No legacy can be recovered from an executor or administrator without a refunding bond to protect him against debts which may arise. *Linsenbergler vs. Gourley*, 56 Pa., 166.

XII. NEGLECT TO PAY. 1. Where the person named as legatee in a will is dead at the time of making it, the legacy is void. *Cunkle's Estate*, 1 Pearson, 436. 2. Where a testator dies without leaving personal estate sufficient for the payment of legacies, they are adeemed wholly or *pro tanto*, unless there is something in the will to denote an intention that they should be paid out of the real estate. *Duval's Estate*, 146 Pa., 176. 3. Where an accountant commingles with his own money funds awarded to a distributee or legatee, he is liable for interest from one year after the adjudication of his account. He may hold the legacy for a year, where the legatee's whereabouts are unknown. After that time it should be deposited

Legacy—Continued.

at interest in a savings bank or trust company, or, as the last resort, paid into court. *Vogdes' Estate*, 23 W. N., 471.

XIII. NEGLECT TO PAY INTEREST UPON. The rule that legacies are not payable till the end of the year, and do not bear interest until then, does not apply to legacies charged on the person of a devisee to pay the specified legacies. *Hamilton vs. Porter*, 63 Pa., 332.

Letters.

I. NEGLECT IN ADMITTING IN EVIDENCE. A private letter, the only proof of which is the testimony of a witness that he received it by mail, and that it had the signature of a certain person, but the witness had no knowledge of the signature, is not admissible in evidence. *Sweeney vs. Oil & Gas Co.*, 130 Pa., 193.

II. NEGLECT IN MAILING. Delivery of a letter, duly stamped and properly directed, to a United States letter carrier while on his rounds, is a legal mailing thereof. *Pearce vs. Langfit*, 101 Pa., 507.

III. NEGLECT TO DELIVER. There is no presumption of law that a letter mailed to one at the place he usually receives his letters, was received by him. A strong probability of its receipt may arise from the fact of its deposit in a mail bag. *Bellefonte Bank vs. McManigle*, 69 Pa., 156.

IV. NEGLECT TO GIVE NOTICE. Letters properly directed and duly mailed are sufficient evidence of notice of the dishonor of bills or non-payment of negotiable notes. It establishes no such legal conclusion in other business relations. It is nevertheless a step towards proving actual notice. With slight corroborative notice, a jury might be justified in finding such notice. *Kenney vs. Altvater*, 77 Pa., 38.

V. NEGLECT TO RECEIVE. 1. There is no presumption of law that a letter mailed to one at the place he usually receives his letters was received by him, and hence the mailing of a letter, without more, to a person does not affect him with notice. *Biglin vs. Reichard*, 2 Luzerne Register, 169.

Letters—Continued.

2. The depositing a letter, properly addressed, with the postage prepaid in the post office, is *prima facie* evidence that the person to whom it was addressed received it. *Folsom vs. Cook*, 115 Pa., 539. 3. The presumption that a letter addressed to a party and deposited in the post office was delivered, is only *prima facie* evidence and may be rebutted. *Pleasant Valley vs. Burke*, 5 Kulp, 140. 4. Depositing in the post office a properly-addressed prepaid letter raises a natural presumption that it reached its destination by due course of mail, and is *prima facie* evidence that it was received by the person to whom it was addressed. *Whitmore vs. Ins. Co.*, 148 Pa., 405. *Jensen vs. McCorkell*, 154 Pa., 323.

Libel.

I. NEGLECT IN AFFIDAVIT FOR A CAPIAS. The affidavit to support a *capias* for alleged libel should specify the exact language used, and should aver publication. *Beach vs. Wade*, 3 W. N., 219.

II. NEGLECT IN PUBLISHING. A letter written by the defendant to the plaintiff's attorney in response to a threat by the latter to institute suit against him, the defendant's letter charging the plaintiff with an attempt to cheat him, is a privileged communication, and an indictment based thereon should be quashed. *Comm. vs. Pavitt*, 14 W. N., 27.

III. NEGLECT OF EDITOR OF NEWSPAPER. A proprietor of a newspaper who, for a libel published in it, was criminally convicted and fined, sought to recover from his editor, who was the author of the libel, the expenses which he had incurred by his misfeasance; held, that no person who has committed a criminal act shall recover compensation against a person who has acted jointly with him in the commission of such crime. *Armstrong Co. vs. Clarion Co.*, 66 Pa., 220.

IV. NEGLECT TO ESTABLISH PLEA OF JUSTIFICATION. A failure to establish a plea of justification enhances the damages, because the plea is a reiteration of the libel. *Smith vs. Times Co.*, 36 W. N., 561.

Libel—Continued.

V. NEGLECT TO PROVE MALICE. In action for libel, in order to prove malice, it is not necessary to show the accused bore the injured party ill-will; if the publication be wilful and is not privileged, malice may be inferred. *Comm. vs. Brown*, 1 Pa. Dist., 565.

Licenses.

I. NEGLECT IN APPLICATION. 1. The twelve signers of the certificate required by statute to an application for a license to sell liquors at a hotel, or eating house, must write their own signatures; a mark or the name written by another is not sufficient. They must also be citizens and residents of the township. *Grant's Application*, 2 Montgomery Co., 121. *Faugnan's Application*, *Idem*, 125. *Hoy's Application*, 3 *Idem*, 188. 2. Courts are just as much bound to grant licenses in proper cases as they are to refuse licenses in improper cases. Courts do not make the law; their only function is to administer it. The applicant must present in his petition the following facts: (1) That he is a person of good repute for honesty and temperance. (2) That he has the accommodations required by law. (3) That his house is necessary to accommodate the public and to entertain strangers and travelers. The application should be signed only by citizens of the borough or ward in which the public house is asked for. *License, In re*, 19 W. N., 357.

II. NEGLECT IN BOND. The commonwealth is entitled to a clean bond, without erasures; a bond which upon its face requires no explanation. *Comm. vs. Wilson*, 25 W. N., 148.

III. NEGLECT IN GRANTING. A license improvidently granted without fulfilling the requirements of the acts, may be revoked. When more than one license has been granted to one person, he cannot make the other licenses good by transferring them. The discretion in granting or refusing licenses must not be the personal wish of the court on the subject of license. The public good is primarily to be considered. In license applications, the court must not decide arbitrarily. *Whitling's Petition*, 18 Phila., 670. *Kelly, In re, Idem*, 446. *Hayes, In re, Idem*, 456.

Licenses—Continued.

IV. NEGLECT OF NOTICE OF REMONSTRANCE. When a remonstrance is filed against an old license, without notice to the petitioner, and no evidence of change of circumstances since the original license was granted, or of specific acts of misconduct, the license will be granted. *Reif's License*, Lehigh Valley Rep., 400.

V. NEGLECT OF PARTY HOLDING A LICENSE. Where proof is made to the court, that the party holding a license has violated any of the laws relating to the sale of liquors, the act is mandatory upon the judge to revoke the license. *Genova's License*, 3 Pa. Dist., 722. *Comm. vs. McCandless*, *Idem*, 30.

VI. NEGLECT OF REMONSTRANTS. General remonstrances are not responsive to any petition filed, and hence are valueless. Only neighboring citizens should sign petitions or remonstrances. The best evidence of the necessity of a public house is the amount of lawful business done there the previous year. *License Cases, In re*, 4 Lancaster Review, 133.

VII. NEGLECT TO AVAIL ONE'S-SELF OF. In the event of the death of an applicant for a retail liquor license, pending proceedings for the granting of the same, the license may be issued to the successor of, or a substitute for, the original applicant. *McOmber's License*, 3 Pa. Dist., 431.

VIII. NEGLECT TO CONTINUE. 1. The courts have power to revoke a liquor license upon cause shown. *Gabel's License*, 13 Luzerne Register, 445. 2. Under the act of May 13, 1887, it is the duty of the court to revoke the license of one who violates the liquor laws. *Woodward's Application*, 3 Montgomery Co., 190. *Niblock's License*, *Idem*, 153, 154. 3. The selling of liquors to a person of known intemperate habits, or to a person visibly affected by intoxicating drinks, is such a violation of the act of 1887 as will compel the court to revoke the license. *Konetzki's License*, 6 Montgomery Co., 82. *Monaghan's License*, *Idem*, 84.

IX. NEGLECT TO GRANT. 1. The licensing power of the court is to be regarded as a solemn trust, to be administered fearlessly, impartially and conscientiously. In applications for

Licenses—Continued.

license, the petitions and remonstrances are persuasive but not conclusive evidence on the question of necessity. *Arnold's Application*, 1 Northampton Co., 93. *Conroy's License, Idem*, 413. 2. A judge has lawfully exercised his discretion in refusing a liquor license under the act of June 9, 1891, where he states in his opinion that he had personal knowledge of the facts pertinent to the case, and made careful inquiry as to the necessity of the license, and the fitness of the applicant, and, considering the best interests of the community, he refused the application. *American Brewing Co., In re*, 161 Pa., 378. 3. While it is the duty of the court to grant licenses to sell spirituous liquors, in proper cases, notwithstanding the remonstrances, yet the court should consider the number and character of the petitioners and remonstrants, and where the prevailing sentiment of a community appears to be that there is no necessity for a licensed hotel, the license should not be granted. *Bedlow's License*, 2 Montgomery Co., 30. *Callahan's Application, Idem*, 117. *Smith's Petition, Idem*, 118. *Beaver Co. Licenses*, 3 *Idem*, 64. *Liquor Licenses, In re*, 4 *Idem*, 77. 4. The discretion of the court in granting or refusing to sell liquors is to be exercised on a due consideration of all the facts known to the court. The sale of intoxicating liquors, by licensed houses, in flasks, bottles or other vessels to be drunk elsewhere, is contrary to the spirit of the license laws. *Boldridge's Application*, 2 Delaware Co., 117. *Dugan's Application, Idem*, 305. 5. The discretion of the court in granting or refusing hotel licenses, is to be exercised on a due consideration of the facts disclosed. *Boldridge's Application*, 2 Chester Co., 237. *Derr's Application, Idem*, 505. 6. In passing upon petitions for liquor licenses, the court should consider matters within its own knowledge as well as those produced by depositions. *Bourjohn's Petition*, 3 Delaware Co., 3. 7. An applicant for a wholesale liquor license, under the act of May 24, 1887, whose license was refused by the quarter sessions, applied to the supreme court for a mandamus, alleging his citizenship,

Licenses—Continued.

his temperate habits and good moral character ; that he had complied with all the requirements of the law, and that no remonstrance had been made against him. The supreme court refused to issue the mandamus. *Comm. vs. Fell*, 28 W. N., 429. 8. Where a remonstrance was filed, alleging that an applicant for a license to sell liquor was not of good moral character, and a hearing was had, the refusal to grant a license cannot be reviewed by the supreme court on the merits. *Collam's Petition*, 134 Pa., 551. *Wheelin's Petition*, *Idem*, 554. 9. The associate judges may grant or refuse a license to sell liquors without or against the consent of the the president judge. *Kahrer's License*, 1 Pa. Dist., 547. 10. The discretion which the court has in passing upon applications for license is judicial in its nature, but it may refuse to grant a license, although the petition presents a *prima facie* case, if it knows from its own observation and acquaintance, that the applicant is not a fit person, or that the house is not necessary. *Kelminski's License*, 164 Pa., 231. 11. A decision on the granting of a license is judicial, not arbitrary or wilful ; a sound discretion exercised upon the circumstances of each case presented, and not a general opinion upon the propriety of granting licenses. In judging the necessity of licenses, the court will be governed by the number and character of the petitioners for and against the proposed license. Any citizen, male or female, may sign petitions and remonstrances. *Licenses, In re*, 2 C. P. Reporter, 68. 3 *Idem*, 211. *Susquehanna Chronicle*, 2. 12. The necessity for the sale of liquors is a matter to be determined by the court in the exercise of its sound judicial discretion. The opinions of residents of the vicinity, as manifested in special petitions and remonstrances, should have great weight. *King's Application*, 2 Pa. County, 17. *Severns' License*, *Idem*, 75. *Northumberland County Licenses*, *Idem*, 660. *Vandike, In re*, 16 Phila., 652. 13. Upon an appeal from the decree of the quarter sessions refusing to grant a liquor license, the supreme court will not review the facts of the case. *Leister's Appeal*, 20 W. N., 224.

Licenses—Continued.

14. On applications for licenses to sell liquor, the court, has no personal discretion, except as to the fitness of the petitioner and the sufficiency of the accommodations provided by him. *McGoldrich's Petition*, 1 Delaware Co., 469. 15. Licenses will be refused, when it appears from the number and character of the remonstrants, that the particular license is unnecessary for the accommodation of the public and the entertainment of strangers and travelers. It is the necessity for a hotel or eating house which is to be considered. *Mercer Co. Licenses*, 3 Pa. County, 43. *Beaver Co. Licenses, Idem*, 56. *Wayne, Co. Licenses, Idem*, 301. 16. The act of May 24, 1887, confers upon the court no power to determine the fitness of a person to receive a wholesale license to brew liquors, except as to citizenship, temperate habits and good moral character. *Prospect Brewing Co.'s Petition*, 127 Pa., 524. 17. Where the record of an application for a retail liquor license shows that the case was considered by the lower court, the supreme court will not reverse, although the lower court filed no opinion, and assigned no reason for its action. *Quinton's License*, 169 Pa., 115. 18. A judge who refuses all applications for licenses, unless for cause shown, errs as widely as a judge who grants all applications. In either case, it is not the exercise of judicial discretion, but of arbitrary power. *Raudenbusch's Petition*, 120 Pa., 328. *Gordon's Application*, 7 Pa. County, 136. 19. Under the wholesale license act of June 9, 1891, the courts have no authority to inquire into the necessity in the case of brewers and distillers; and if the applicants are qualified, it is the duty of the court to grant the license. *Rieger, In re*, 8 Montgomery Co., 89. 20. Where the record in an application for a liquor license shows that the case was heard, considered and refused by the court because there was no necessity for the house to be licensed, and there is nothing else on the record, the supreme court will not assume that the license court acted arbitrarily. *Sandcroft's License*, 168 Pa., 45. 21. Under the act of May 13, 1887, the courts of quarter sessions have the discretion to grant or refuse

Licenses—Continued.

licenses to sell liquor; such discretion, however, is to be exercised in a sound judicial manner. A belief in the mind of the judge that licenses should not be granted at all, is to make law, not to administer it. *Sparrow's Petition*, 138 Pa., 176. 22. To grant or refuse a tavern license is entirely within the discretion of the court, and no appeal lies therefrom. *Toole's Appeal*, 90 Pa., 376.

X. NEGLECT TO OBTAIN. 1. A sale of liquor without a license, even by a club organized in good faith, through its officers or employees, even to one of its own members, is a violation of law. The transaction is a sale, whether the liquor is paid for in cash or charged to a member. *Comm. vs. Steffner*, 10 Lancaster Review, 92. 2. Where premises were let for use solely as a saloon, the tenant is liable for rent, even if he fails to obtain a license to sell liquors. The risk of obtaining it was assumed by the lessee, and that risk he knew depended on many contingencies, such as public necessity, character and conduct of the appellant, etc. *Teller vs. Boyle*, 132 Pa., 59.

XI. NEGLECT TO OBTAIN LICENSE FOR SALE OF PATENT MEDICINES. By the act of 1849, persons who sell patent medicines are obliged to take out a license. *Laffer's Appeal*, 13 Phila., 499.

XII. NEGLECT TO REFUSE. 1. When the court is judicially convinced of the necessity for a license, a license will be granted though a remonstrance be filed, signed by a far greater number of persons than the signatures to the petition. *Winters, In re*, 26 W. N., 74. 2. The court of quarter sessions may, in its discretion, revoke the license of a tavern-keeper, who sells liquor to minors or apprentices, harbors intemperate persons, or is convicted of selling liquor on Sundays or of any offence involving moral turpitude. *Gowan, In re*, 1 Pearson, 83.

Liens.

NEGLECT TO RESORT TO. It is a rule in courts of equity, that if one party has a lien or interest in two funds for a debt,

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and another party has a lien on or interest in any one of the funds for another debt, the latter has a right to compel the former to resort to the other fund first, for satisfaction, if necessary for the payment of the claims of both parties; and this rule applies to judgment creditors and mortgages.

United States Bank, In re, 2 Parsons, 111.

Life Estates.

NEGLECT OF LIFE TENANTS. 1. A life tenant owes the remainderman no duty, and is not charged with any trust. If, by his wilful neglect or default, the estate is lost, the only redress is an action for damages. He may neglect to pay interest on a mortgage of the fee, and at a sale under a foreclosure, may himself purchase the property. *Fidelity Deposit Co. vs. Dietz*, 132 Pa., 36. 2. A life tenant is never compelled to put premises in better order than when he received them. If the buildings were in a state of decay at the time his term began, he will not be called upon to repair. *Griffith's Estate*, 32 W. N., 62.

Life Insurance. See "INSURANCE."

I. NEGLECT BY CHANGING BENEFICIARY. A policy on the life of the deceased was made payable to his daughter, but was bequeathed to his wife. Held, that the right to the proceeds of the policy vested in the daughter and could not be divested by will. *Rymer vs. Swick*, 1 Luzerne Law Times, 181.

II. NEGLECT BY EXPOSURE TO DANGER. A policy of insurance contained a condition, that the policy should not cover death or injury caused by voluntary exposure to unnecessary danger. The insured, in this case, by a voluntary act, exposed himself to a hidden danger, the existence of which he had no reason to suspect, whereby he lost his life. Held, that his death was caused by an accident, and the company was liable on the policy. *Burkhard vs. Ins. Co.*, 102 Pa., 262.

III. NEGLECT BY INTEMPERATE DRINKING. 1. A clause in a life insurance policy provided, that the company should

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not be liable if the insured should become so far intemperate as to permanently impair his health. Thus no degree of intemperance would defeat a recovery on the policy, unless it had the effect to permanently impair the health of the assured. Any less effect was insufficient. The capacity of persons to drink liquor is so unequal, and the effect so different on different individuals, that it by no means follows that a quantity sufficient to affect another man's health would have the same effect on the health of the assured. The question in issue here is, did the assured's intemperance so affect his health? *Odd Fellows' Ins. Co. vs. Rohkopp*, 94 Pa., 61. 2. In an application for a life insurance policy, the applicant declared that he would not practice any pernicious habit, which obviously tends to the shortening of life. The policy issued contained a provision that if any of the statements made in the application shall be found untrue, the policy shall be void. At the time of making the application, the party was of temperate habits. Subsequently he used intoxicating liquors immoderately, and finally died from an attack of delirium tremens. Held, that his mere declaration that he would not practice a pernicious habit was not sufficient to avoid the policy, there being no covenant or warranty, and no clause in the policy avoiding it in case the assured should practice such habit. *Knecht vs. Ins. Co.*, 90 Pa., 118. 7 W. N., 297. 3. Becoming so far intemperate as to seriously and permanently injure health, in violation of a condition of a policy, renders the policy void. *Stratton vs. Ins. Co.*, 23 Pittsburgh Journal, 17.

IV. NEGLECT IN ALLOWING REBATE OF PREMIUMS. Under the Act of May 7, 1889, no life insurance company in the state shall make any discrimination in favor of individuals, between insurants of the same class and equal expectations of life in the amount or payment of premium charged for policies, nor shall any company or agent pay or allow as inducements to insurance any rebate of premium payable on the policy or any special advantage in the dividends or other benefit not specified in the policy. *Comm. vs. Morningstar*, 144 Pa., 105.

Life Insurance—Continued.

V. NEGLECT IN AMOUNT OF POLICY. Where a creditor takes out a policy of insurance on the life of his debtor as security for his debt, the amount of insurance should not be so disproportioned to the debt as to make it a speculative or gambling transaction. *Ulrich vs. Rcinoehl*, 143 Pa., 238. *Shaffer vs. Spangler*, 144 Pa., 223. But see *Grant vs. Kline*, 4 Lancaster Review, 197.

VI. NEGLECT IN ANSWERS IN APPLICATION. 1. In a suit upon a life insurance policy, in which the answers in the application are warranties, it is competent to show that a truthful answer was given, which the agent wrote down erroneously, and that the insured, believing his answer was correctly written by the agent, signed the application in good faith. *Mullen vs. Ins. Co.*, 7 Kulp, 422. 2. Where the answers to interrogatories accompanying an application for life insurance were representations and not warranties, involving a question of good faith, the jury in a suit against the company found for the plaintiff, although some of the answers were shown to be erroneous. The verdict was not disturbed by the court. *Scharble vs. Ins. Co.*, 9 Phila., 136. *Scott vs. Ins. Co.*, *Idem*, 266. 3. A policy of insurance stipulated, that if any answers or representations made by the assured in his application should be found in any respect untrue, the policy should be void. Where the assured stated that his habits of life were temperate, when in truth he was in the habit of getting uproariously drunk for days after each pay day, his false assertions would vitiate the policy. Even an inaccurate or false answer in certain instances is fatal to a policy, though made in ignorance of the truth. *United Brethren Aid Society vs. O'Hare*, 120 Pa., 256. 24. Although an insured party is held to the exact truth of his warranty, yet if the words of the warranty, taken literally, are inconsistent with the main purpose of the instrument, they may be interpreted, if possible, so as to carry out the intent of the parties and the object in view. *Home Ass'n vs. Gillespie*, 110 Pa., 84.

VII. NEGLECT IN ASSIGNING POLICY. 1. The absolute assignment of a policy of life insurance to one having no inter-

Life Insurance—Continued.

est in the life of the insured, the assignor parting with all control over the policy, renders it a wagering contract as to such assignee, and he cannot recover thereon. *Carpenter vs. Ins. Co.*, 161 Pa., 9. 2. The assignment of policies of life insurance by a debtor, who was insolvent when insured, in trust for the benefit of his wife, is fraudulent and void as against creditors. *Elliot's Appeal*, 50 Pa., 75. 3. A policy of insurance on the life of another taken by one who had an insurable interest in it for the purpose of assigning it to another, who had no such insurable interest, which purpose was effected, makes said policy in the hands of the assignee a wagering policy, upon which an action cannot be maintained. *Keystone Benefit Ass'n vs. Norris*, 115 Pa., 446. 4. A policy of insurance was issued payable to the wife of the assured should she survive him, otherwise to her children. The assured and his wife joined in an assignment of the policy, and afterwards the wife died, leaving children. Held, that her death extinguished her interest, and that of her assignee in the policy, and its proceeds were payable to her children. *Brown's Appeal*, 125 Pa., 303. 5. A man contemplating marriage, took out a policy of insurance on his life, payable to his legal representatives, intended for the benefit of the woman he was about to marry. After his marriage he stated his intention to assign the policy to her, obtained the blank form, but neglected to execute it. The policy was placed in the custody of his wife. The court after his death considered this an executed gift, and awarded the proceeds to the wife. *Madeira's Appeal*, 17 W. N., 202. 6. Life insurance policies are regarded as securities for money, and a voluntary conveyance of them is fraudulent as against creditors. Where a policy was issued to the assured, the *bona fides* of an assignment thereof to a wife, child or dependent relative may be inquired into. *Neukumcr's Estate*, 3 York Record, 34. 15 Lancaster Bar, 51. 7. When a life policy is issued to a creditor who holds it as security for a debt, the insured, having an equitable interest therein a parol assignment of such interest by the assured to another creditor, per-

Life Insurance—Continued.

fectured by a transfer of the legal title from the beneficiary, may be valid as against the administrator of the insured. *Shaak vs. Meiley*, 136 Pa., 161.

VIII. NEGLIGENCE IN ASSIGNING POLICY TO CREDITOR. A marked disproportion in the extent of the insurance and the indebtedness of the creditor who is the beneficiary, does not make the policy a wagering one, nor in the absence of positive evidence, that it was intended as a collateral security merely. *Grant vs. Kline*, 4 Lancaster Review, 197.

IX. NEGLIGENCE IN ATTACHING. An attachment execution issued against an insurance company during the life of the assured will not entitle the garnishee to a judgment against the insurance company. *Day vs. Ins. Co.*, 34 Pittsburgh Journal, 52.

X. NEGLIGENCE IN CHANGING RESIDENCE. A policy of insurance provided that the same should be forfeited, if the insured should fail to give notice to the secretary of the company of any change in his residence. The insured did remove his domicile and notified the agent from whom he had obtained his policy, and paid his assessments both before and after his removal. Held, he had sufficiently complied with his promise, and his policy was not forfeited. *United Brethren Aid Society vs. McDermond*, 12 W. N., 73.

XI. NEGLIGENCE IN PROOFS OF DEATH. Where proofs of death furnished to the company are defective or not in conformity with the policy, it is the duty of the insurers to apprise the representatives of the insured of the fact, so as to give them an opportunity to supply the defect, otherwise they will be deemed to have waived all irregularity in the proofs. *Girard Life Ins. Co. vs. Mutual Life Ins. Co.*, 97 Pa., 15.

XII. NEGLIGENCE IN REPRESENTATIONS. 1. In marine insurance, the misrepresentation or concealment of a fact material to the risk will avoid the policy, although no fraud was intended, and although the misrepresentation was innocently made. Many decisions deny that this principle extends to policies against loss by fire, and it certainly does not extend

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to life insurances, unless the policy contained an express provision that the representation was to be the basis, or a condition of the contract. Where a party warranted his answers to be true, and agreed if they were untrue that the policy should be null and void, he is bound by them. *Aicher vs. Ins. Co.*, 6 W. N., 332. 13 Phila., 139. 2. The words "sober and temperate" in a life insurance policy are to be understood in their ordinary sense. They do not imply total abstinence from intoxicating liquors. *Brockway vs. Ins. Co.*, 10 Luzerne Register, 181. 29 Pittsburg Journal, 25. 3. Statements made by an applicant for life insurance, where they are incorrect and untrue, will not avoid the policy if they are immaterial to the risk, and are made in good faith and in the belief that they are true. The act of June 23, 1885, decides that the policy in such case will not be forfeited. *Hermany vs. Life Ass'n*, 151 Pa., 17. 4. False representations made by the assured, and included in the written application, may constitute a good defence in an action on the policy. *Norristown Trust Co. vs. Ins. Co.*, 5 Montgomery Co., 83. 5. Where a policy provided, that if any answer or representation made by the insured in his application was in any respect untrue, the policy shall be void, the falsity of the allegations that the applicant's habits of life were temperate, that he had never been afflicted with certain diseases, and that he had not had medical attendance during the previous year, vitiated the policy. *O'Hara vs. Aid Society*, 134 Pa., 422. 6. A person applying for life insurance stated in her application that she had never been treated for heart disease. After the policy had been issued, she wrote a letter correcting this statement, and admitted that she had been treated for heart trouble. Notwithstanding the letter, the company subsequently accepted from the assured an assessment, which had been levied ten days after the letter was received. Held, that the company had waived the irregularity in the application. *Silk vs. Life Ass'n*, 159 Pa., 625. 7. An applicant for life insurance was asked whether he was afflicted with certain specified diseases.

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He then stated that to the best of his knowledge and belief he was free from all diseases not so specifically mentioned. He agreed that if any of such declarations made by him were false, the contract should become void. A policy was issued to him. He subsequently died of a disease which he had at the time, but which was not specifically stated. Held, that as there was no evidence of wilful misrepresentation, plaintiff could recover. *United Brethren Aid Society vs. Kinter*, 12 W. N., 76. 8. Where the insured misstated the fact that he was married, and also his age and occupation in his application, the policy was held void. *United Brethren Aid Society vs. White*, 12 W. N., 147.

XIII. NEGLIGENCE IN SETTLEMENT OF CLAIM. Where an insurance company in good faith settles with the person whom it deems equitably entitled under the policy for the payment of money, it is a complete defence to a suit by the personal representative of the insured. *Brennan vs. Ins. Co.*, 170 Pa., 488.

XIV. NEGLIGENCE IN TAKING POISON. Where a policy of insurance in an accident company provides, that its benefits shall not extend to death or injury caused by the taking of poison, an involuntary taking of poison, by mistake, causing death, is within said provision in the policy. *Pollock vs. Accident Ass'n*, 102 Pa., 230.

XV. NEGLIGENCE IN WAGERING CONTRACT. The law hates wagering contracts. The ordinary rule as to such contracts is, that the plaintiff cannot recover unless he can come into court with clean hands. The law presumes that all men do right and obey the laws; that all contracts made by them are not forbidden. He who alleges the contrary, must prove it. *Lenig vs. Eisenhart*, 127 Pa., 61.

XVI. NEGLIGENCE OF AGENT. A man who accepts a policy on his life through an agent of an insurance company, which accords in all respects with the proposal signed by the insured, and who pays a second premium thereon without objection, cannot afterwards disaffirm the contract and recover back the

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premiums, upon proof that the agent agreed, in consideration of the first premium, to procure for him a policy of a different kind. *Mecke vs. Ins. Co.*, 8 Phila., 6.

XVII. NEGLECT OF ASSIGNEE OF POLICY. One who, with knowledge of the fraudulent character of a policy of life insurance, which was designed for speculative purposes, and without having an insurable interest in the insured, purchases an assignment of such policy, cannot, upon the failure of the company to pay the claim upon the death of the insured, recover from the fraudulent assignor the consideration paid for the assignment. *Blattenberger vs. Holman*, 103 Pa., 555.

XVIII. NEGLECT OF CREDITORS' CLAIMS. 1. A man deeply indebted may take insurance on his life payable to his wife, and creditors can acquire no right to the same. *Hallstead's Estate*, 12 Luzerne Register, 394. 2. The act of April 15, 1868, provides, that all policies of life insurance or annuities which have been taken out for the benefit of or *bona fide* assigned to the wife or children or other relative dependent upon such person, shall be vested in them free from all claims of creditors. *McCutcheon's Appeal*, 99 Pa., 137.

XIX. NEGLECT OF INSURABLE INTEREST. 1. The estate of an insured party cannot recover, where the company, without notice, paid the person named in the policy, though he had no insurable interest. There was no contract with the widow and heirs. *Bomberger vs. Aid Society*, 18 W. N., 459. 2. A cousin has not such an insurable interest in the life of the insured as to take the policy out of the wager class. It seems that the burden of proving an insurable interest rests on the plaintiff. A clause in a policy that it shall be incontestable after three years, will not prevent the defendant from setting up as a defence the want of insurable interest. *Brady vs. Ins. Co.*, 5 Kulp, 505. 3. As a general rule, no one can insure the life of another unless he has an interest in that life. A creditor, however, may insure the life of his debtor. *Brockway vs. Ins. Co.*, 10 Luzerne Register, 181. 4. 2 York Record, 101. 29 Pittsburg Journal, 25. 1 Kulp, 392. A woman took out a

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policy of insurance payable to her administrator. Subsequently she gave the policy to her daughter-in-law, with instructions to pay the premium and the insured's funeral expenses, and give the balance to the granddaughter of the insured. The daughter-in-law paid the premiums. Held, that the policy was not a wagering one, and the insurance company must pay, though no disclosure of the arrangement was made to it in the lifetime of the insured. *Burke vs. Ins. Co.*, 155 Pa., 295.

5. A young girl who is befriended by an elderly man, who pays her expenses at school, where she remains until his death, has an insurable interest in the life of her benefactor. In the above case, the deceased, four months before his death, took out a policy of insurance on his life, payable to himself, paying the premium thereon. Thirteen days later he assigned the policy in writing to the young girl he was befriending, and delivered it to her. *Carpenter vs. Ins. Co.*, 161 Pa., 10.

6. There may be an insurable interest not accompanied by kinship. Such interest implies a pecuniary interest present or prospective. A moral obligation is sufficient to support it. A creditor has an insurable interest in the life of his debtor. *Carpenter vs. Ins. Co.*, 161 Pa., 16.

7. A nephew insured the life of his aunt, he being her creditor when the insurance was effected. The debt was settled before the aunt died. In a suit between the nephew and the executor of the aunt, the nephew was held entitled to the proceeds of the insurance. In cases of relationship between the parties, it has been held that there must be some dependence by the assured upon the insured to give the former an insurable interest, but the rule is not enforced with as much vigor as it formerly was, and therefore the possibility that there may be a dependence, or that a pecuniary interest may arise, or a loss happen, has been held in later cases to be an insurable interest. Where a husband insured his life for the benefit of his wife, and subsequently they were divorced, it was held, that notwithstanding the relationship had ceased, and consequent right of dependence on him had been taken away, yet she could recover

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the full amount of the policy. *Corson vs. Garnier*, 17 Phila., 341. 15 W. N., 451. 2 Lancaster Review, 81. 8. An insurable interest in the life of another, such as will take the contract of insurance out of the class of wager policies, is such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage from the continuance of his life. Where one has an insurable interest at the time an insurance is effected upon the life of another for his benefit, the fact that it has ceased to exist prior to the death of the insured, will not, as against the personal representations of the assured deprive him of the right to receive the insurance money. *Corson's Appeal*, 113 Pa., 438. *Keystone Benefit Ass'n vs. Norris*, 115 Pa., 446. *Scott vs. Dickson*, 108 Pa., 6. 9. The assignee of a policy of life insurance taken out by the assured on his own life, though made by the assured in good faith, to a person who has no insurable interest in the life of the assured, is a wagering contract and contrary to the policy of the law. *Downey vs. Hoffer*, 110 Pa., 106. *Wegman vs. Smith*, 16 W. N., 186. 10. A sister, although a married woman and in no way dependent upon a brother for support, and to whom he is in no way indebted, has an insurable interest in the life of such brother. (Affirmed by the United States supreme court.) *France vs. Ins. Co.*, 20 Pittsburg Journal, 170. 11. One having no interest, as relative or creditor, in the preservation of the life of an insured person, can acquire no title, by assignment or otherwise, to the sum payable on the death of the insured. Wagering policies are illegal. *Gilbert vs. Morse*, 104 Pa., 74. *Meily vs. Hershberger*, 16 W. N., 186. *Vanomer vs. Homberger*, 142 Pa., 579. 12. Where the amount of insurance held by a creditor of the insured is entirely disproportioned to the amount of the debt, it may be deemed a wagering policy. Care must be taken also that a debt shall not be collusively contracted for the mere purpose of creating an insurable interest. Our courts have not decided

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how great must be the disproportion in order to render it a wagering policy. *Grant vs. Kline*, 115 Pa., 618. *Cooper vs. Weaver*, 35 **Pittsburg Journal**, 383. *Cooper vs. Shaeffer*, 20 **W. N.**, 123. 13. Where a person having no insurable interest in the life of a decedent, receives money from an insurance company on a policy, he is liable to the person legally entitled to the money. *Hettinger vs. Speck*, 3 **Lancaster Review**, 33. *Shott vs. Westenberger, Idem*, 273. 14. The relation of father and son is sufficient to establish an insurable interest in the father. The company by granting such a policy estopped itself from averring such an interest was not insurable. *Kane vs. Ins. Co.*, 9 **Phila.**, 234. 15. When a sister lives in the house of her brother who supports her in his family, rendering her his debtor, he has an insurable interest in her life. Reputable authorities have recognized the relation of brother and sister to be sufficient in itself to constitute an insurable interest. *Keystone Association vs. Beaverson*, 16 **W. N.**, 188. 16. One may have an insurable interest in the life of another in two ways: first, he must be of the blood of the insured in such a degree as to give him an insurable interest; second, the relation of debtor and creditor must exist between them. *Lenig vs. Eisenhart*, 127 **Pa.**, 61. 17. A wagering policy of life insurance cannot be enforced in the courts of this state, although valid in the state where it was signed, and is to be paid. *McDermott vs. Ins. Co.*, 7 **Kulp**, 246. 18. A nephew by marriage, who is named as a beneficiary in a policy of insurance upon the life of his aunt, and who pays all the premiums and assessments due under the policy, is only entitled to retain out of the money paid to him by the insurance company the premiums and assessments he has paid. *Riner vs. Riner*, 166 **Pa.**, 617. 19. A policy of insurance in favor of one who has no interest in the life of the insured, either as a near relative or as a creditor, is speculative and a wager on the life of the assured. As against the representatives of the estate of the assured, the said beneficiary can hold of the proceeds of the policy only the amount which he has expended for fees and

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expenses. *Ruth vs. Katterman*, 112 Pa., 251. 20. Life insurance, unlike fire or marine insurance, is not a contract of indemnity, but is a contract to pay a certain sum of money in the event of death. A man may insure his own life, paying the premium himself, for the benefit of another who has no insurable interest; such a transfer is not a wagering policy. *Scott vs. Dickson*, 108 Pa., 6. *Hill vs. Ins. Co.*, 154 Pa., 29. *Overbeck vs. Overbeck*, 155 Pa., 5. 21. Where one neither a relative nor a creditor insures the life of another for his own benefit, even though it be in good faith and for the honest purpose of reimbursing him for the outlays he may be called upon to make, under an agreement with the assured to support him during life, public policy will not permit him to retain out of the proceeds of the insurance more than sufficient to reimburse him for the support of the assured and the expenses of the insurance. The balance belongs to the estate of the assured. *Siegrist vs. Schmoltz*, 113 Pa., 326. 22. The question of insurable interest is not a question of good faith on the part of the beneficiary, but a question of public policy. *Siegrist vs. Smoltz*, 113 Pa., 326. 23. A son-in-law has no such pecuniary interest in the life of his mother-in-law as to permit him to effect a valid insurance thereon for his benefit. Neither could inherit from the other. There was no consanguinity between them. As to him it was purely a gambling contract. *Stoner v. Line*, 16 W. N., 187. 24. A creditor may lawfully take out a policy of insurance on the life of his debtor in an amount sufficient to cover the debt and the cost of such insurance with interest thereon, during the period of the debtor's expectancy of life, according to the Carlisle Tables; but if such amount be exceeded, the policy may be a wagering transaction. A slight mistake, however, will not necessarily vitiate a policy taken out in good faith. *Ulrich vs. Rcinoehl*, 143 Pa., 238. 25. To create an insurable interest which will support a contract of life insurance, there must be a reasonable ground founded on the relations of the parties, either pecuniary, or of blood, or affinity, to expect some relief or advantage from

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the continuance of the life of the insured. If no insurable interest be shown, the law presumes that the insurance was procured for the purpose of a wager or speculation. *U. B. Aid Society vs. McDonald*, 122 Pa., 324. 26. A stepson living apart from his stepfather, not dependent upon him or responsible for his support, has no insurable interest in his life. It is the duty of the court to give binding instructions where the policy is a wagering one. *United Brethren Aid Society vs. McDonald*, 22 W. N., 405.

XX. NEGLECT OF NOTICE OF PREMIUM DUE. If it be shown that it was the custom of a life insurance company to send a policyholder due notice of premiums about to become due, and relying upon such notice being sent, which on this occasion was not done, he failed to pay the premium on the day it was due, he should not be held derelict for such omission. *Johns vs. Ins. Co.*, 2 W. N., 243. *Globe Life Ins. Ass'n vs. Johns*, 4 W. N., 131. *Contra, Smith vs. Ins. Co.*, 14 W. N., 129.

XXI. NEGLECT OF ONE COMMITTING SUICIDE. 1. If the insured possessed sufficient mental capacity to form an intelligent intent to take his own life, and was conscious that the act he was about to commit would effect that object, it avoided the policy. If, however, his mind was so impaired that he was incapable of forming such intent, and was unconscious of the effect of his action, a recovery could be had. *American Life Ins. Co. vs. Isett*, 74 Pa., 180. 2. A policy of insurance, which provides that it shall be void if the insured shall die by suicide, is not forfeited by such act, if the insured party was insane at the time, but intending to take his life. *Connecticut Ins. Co. vs. Groom*, 86 Pa., 92. 3. A legal conclusion of suicide ought not to be drawn from the mere fact of a belief in spiritualism. The party alleging suicide must prove it. The mere fact of death in an unknown manner creates no legal presumption of suicide. *Continental Ins. Co. vs. Delpuech*, 82 Pa., 225. 4. A policy of insurance contained the clause, "or in case he shall die by his own

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hand, this policy shall be null and of no effect." Held, that this proviso exempts the insurers from liability in case of suicide, although the act may be distinctly traced as the result of a diseased mind, and that if the assured committed the act, intending to destroy his life, and comprehending the physical nature and consequences of his act, the plaintiff should not recover. *Nimick vs. Ins. Co.*, 3 Pittsburg, 393. 18 Pittsburg Journal, 164. 5. The clause in a policy of insurance which excepts from the risks assumed thereby the death of the assured by his own hand, operates irrespective of the condition of the mind of the insured respecting his moral and legal responsibility. *Nimick vs. Ins. Co.*, 3 Brewster, 502. 6. A condition in an Ohio policy of life insurance provided, that in case the insured died by his own hand, whether sane or insane, the policy should be void. The Ohio statute reads, that all companies after having received three annual premiums on any life policy, are estopped from defending on any other ground than fraud. The insured in this case took his own life. Held, that the clause in the Ohio statute related solely to defences based on errors, omissions or misstatements in the application, and had no effect whatever on the condition against suicide. *Starck vs. Ins. Co.*, 26 W. N., 13. 134 Pa., 45.

XXII. NEGLECT TO AVOID DANGER. A policy of insurance contained a condition, *inter alia*, that the insurance should not cover death or injury resulting from the inhalation of gas. On the day he received the policy, the insured, in good health, went down into a well to make repairs to a pump, where he was killed by inhaling poisonous gas existing at the bottom of the well. Held, that the condition against inhalation of gas contemplated a voluntary and intelligent act by the insured, and was inoperative to relieve the company from liability in this case. *Pickett vs. Ins. Co.*, 149 Pa., 79.

XXIII. NEGLECT TO EXPLAIN PHYSICAL CONDITION. When an applicant for life insurance answers the questions of the medical examiner in good faith, and does so with reference to

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the construction and explanation of the questions given at the time by such examiner, there can be no objection to proving the facts and submitting them to the jury. *Connecticut Ins. Co. vs. McMurdy*, 89 Pa., 363.

XXIV. NEGLIGENCE TO GIVE NOTICE OF DEATH. Where the assurer agrees to pay the sum assured upon the death of a party, no notice of the death to the assurers need be given before suit brought. *Penn Aid Society vs. Corley*, 3 York Record, 17.

XXV. NEGLIGENCE TO INSTITUTE SUIT. 1. A clause in a policy provided, that no action shall be maintainable unless such suit be commenced within six months after the decease of the person named in the policy. This condition is not relieved by a clause, reading that if the insured shall die three or more years after the date hereof, having paid all due premiums, the policy shall be incontestable. *Brady vs. Ins. Co.*, 168 Pa., 645. 2. A condition in a life insurance policy that suit shall not be brought after six months from the death of the insured, is valid, but being for the benefit of the insurer may be waived. The waiver need not be express, but may be inferred. *Edwards vs. Ins. Co.*, 5 Kulp, 259. 3. A policy of life insurance provided, that no suit or action at law under this contract shall lie unless the suit be commenced within one year from and after the death of the insured. In the present case, a suit instituted within the year in another county was dismissed for want of jurisdiction. A second suit was brought within one year after the dismissal of the former one, but nearly two years after the death of the insured. Held, that the second action was not brought in time to comply with the condition of the policy, and hence that the defendant was entitled to judgment. *Keystone Ass'n vs. Norris*, 19 W. N., 248. 115 Pa., 447. 4. A by-law of an insurance company provided, that suit must be brought within six weeks next after the loss shall have occurred. The assured suffered an accident which disabled him from working for ten weeks. His policy covenanted that he should be paid a certain sum

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for every week he was disabled. On failure of the company to pay, the limitation of the six months named in the by-law, did not begin to run until the cause of action was complete, which was not until the expiration of ten weeks after the happening of the accident. *Mutual Accident Ass'n, vs. Kayser*, 14 W. N., 86.

XXVI. NEGLECT TO ISSUE A PAID-UP POLICY. A policy holder, whose policy is forfeited for non-payment of premiums is not entitled to receive a paid-up policy. *Smith vs. Ins. Co.*, 11 W. N., 156. 14 W. N., 129.

XXVII. NEGLECT TO MEET ENGAGEMENTS. When a life insurance company has been adjudged insolvent and has been dissolved, it has broken its engagements with its policy holders and becomes liable to them on account of such breach, and they may claim damages. *Comm. vs. Ins. Co.*, 162 Pa., 586.

XXVIII. NEGLECT TO PAY ASSESSMENTS. 1. The policy of a mutual life insurance company provided, that a failure to pay any assessment within forty days after notice of the death of a member should work a forfeiture of the policy. Where a member neglected to pay four assessments, but through his representative, paid the fifth assessment, which the company temporarily held until it could hear from him in relation to the preceding assessments, but he died in the meanwhile, held, his representatives could not recover. *Mutual Protection Ins. Co. vs. Laury*, 84 Pa., 43. 2. The right of a member of a mutual association to its death benefits was dependent upon his payment within a limited time after notice of assessments made upon proofs of a member's death. Having failed to pay such assessment within the required time after notice received, a member was marked delinquent. He subsequently died without paying the assessment. Held, that his widow could not recover. *Passenger Conductors' Ins. Co. vs. Birnbaum*, 116 Pa., 565.

XXIX. NEGLECT TO PAY PREMIUMS. 1. Where a resident of Virginia took out a policy of life insurance in a Philadelphia company, and was unable to pay the premiums during

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the civil war, but at its conclusion tendered them to the company with interest, but was told his insurance was forfeited, held, that apparently a court of equity should relieve him against the forfeiture and reinstate him in his insurance on his paying all the premiums with interest on each. *Bird vs. Ins. Co.*, 11 Phila., 485. 23 Pittsburgh Journal, 112. 2 W. N., 400. *Girard Ins. Co. vs. Ins. Co.*, 2 W. N., 320. 2. A policy of life insurance was duly executed and sent to the agent of the company, but was not delivered to the insured, because of non-payment by him of the premiums. It was not paid up to the time of his death; held, that the contract of insurance was therefore not complete. *Collins vs. Ins. Co.*, 7 Phila., 201. *Kerns vs. Ins. Co.*, 3 W. N., 390. 3. An insurance policy contained a clause, that the same was not to be binding until the advance premium was actually paid during the lifetime of the insured. The agent held the policy and in an account with the company charged himself with the premium. After the death of the assured, the premium was paid to the agent and the policy delivered. Held, that the company was bound by the acceptance of the premium, and was liable for the loss. *Continental Ins. Co. vs. Ashcraft*, 18 W. N., 96. 4. Where it is the general practice of mutual life insurance companies to receive overdue premiums, if a premium be tendered within a reasonable time after it becomes due, and while the assured is in his usual health, the policy will not be forfeited. Usually thirty days of grace are allowed for payment. *Girard Life Ins. Co. vs. Mutual Ins. Co.*, 86 Pa., 236. 5. The general agent of a company agreed with the assured to notify her of the falling due of the premiums. Notices were regularly sent by the company for all payments of premiums except that immediately preceding the death of the assured, for which no notice was received, and hence the premium was not paid. The policy contained a claim of forfeiture for non-payment of premiums when due. Held, that the jury should decide whether the company by their conduct misled the assured, who relied on notice being

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sent her, and was therefore estopped from setting up the clause of forfeiture. *Globe Life Ins. Co. vs. Johns*, 4 W. N., 131. 6. A mutual life insurance company is not liable upon a policy issued to the assured on receipt of his promissory note for the first premium, which note was not paid at maturity. *Kerns vs. New Jersey Ins. Co.*, 86 Pa., 171. 7. A policy stipulated for the payment of quarterly premiums by the insured, providing that if they should not be paid on the dates named, the policy should determine, and that the acceptance of a premium after maturity should not be a waiver of payment of any future premiums at maturity. A general agent of the company practically had authority to receive premiums after maturity, provided the assured was at the time in good health. The agreement of each agent to receive the overdue premium at a given date would not be binding on the company if prior to the date the assured should die or become ill. *Lautz vs. Ins. Co.*, 139 Pa., 546. 8. The profits of a mutual life insurance company earned, but not declared as dividends or otherwise, cannot be treated as funds in the hands of the company applicable to the payment of premiums. It is the usual practice of a life insurance company not to receive payment of overdue premiums until it has made inquiry as to the present health of the assured. Usually such policies provide, that if the premiums be not paid on or before certain days, the policy should become void. *Mutual Ins. Co. vs. Girard Ins. Co.*, 100 Pa., 172. 9. A policy does not lapse or become forfeited by non-payment of the premium on the day named, where the premiums are by contract subject to variations depending upon the dividends to which the insured is entitled, and the company has neglected to transmit to him a statement of the amount of premiums due after such deductions, as has been their invariable custom with him, until some time afterward, he being prepared to pay the amount at the time it was due. *Phoenix Ins. Co. vs. Doster*, 12 W. N., 257. 10. A policy of life insurance required payment of premiums in cash on a day certain; the agent accepted the note of the insured in place

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of cash. The note was dishonored. Held, that whether the note was taken as an absolute or conditional payment was for the jury. *Security Life Ins. Co. vs. Elliott*, 3 W. N., 504-11. A request for the issue of a "paid-up" policy must be made while the original policy is in full life, and not after it has become forfeited for non-payment of premiums. An insurance company which is in the habit of sending notices to its assured at the time when the premiums are due, is not obliged to continue the practice, and the neglect of the assured to pay at the proper time is at his own risk. *Smith vs. Life Ins. Co.*, 103 Pa., 177. 12. Forfeiture of a policy of insurance for non-payment of premium when due is waived on proof of a general custom of insurance companies to accept premiums after they become due, and it is not necessary to show that the defendant adopted such a custom. The authority of the agent to give the time may be inferred from the course of dealing between the parties. *Blakiston vs. Ins. Co.*, 15 Phila., 315. 13. Where an insurance company, in an action on a policy, defends on the ground that the premium has not been paid when due, evidence may be given on behalf of the plaintiff to show the previous course of dealing between himself and the company as to the payment of overdue premiums. Testimony is inadmissible to show that the company has been in the habit of notifying the insured when the premiums were due by him, but had failed to do so in this particular instance, unless it be shown that the notice was purposely omitted with the design of forfeiting the policy. In such case, evidence is admissible on behalf of the plaintiff to show a usage among insurance companies to receive premiums within a reasonable time after they fall due under policies similar to that in suit, if the insured be in good health, notwithstanding the policies contain a clause of forfeiture for non-payment of premiums the very day when due. *Girard Life Ins. Co. vs. Mutual Life Ins. Co.*, 97 Pa., 16. 14. Generally a contract is not to be affected by anything but its terms, but there are cases in which its execution may be curtailed by custom.

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Thus where the premiums on a policy of life insurance were payable on special days, with a clause of forfeiture in case of non-payment at the day, held, in an action to recover the paid premiums, evidence was admissible to show that it was the custom amongst insurance companies to receive premiums within thirty days after they were due, if the assured was in his usual health. If it was the practice of the company to give notice before each premium was due, which notice was omitted in this instance, the company cannot take advantage of a default which it encouraged. Forfeitures are odious in law. *Helme vs. Phila. Ins. Co.*, 61 Pa., 107. 15. Where an agent of a life insurance company has granted an extension of time to pay the premium due, and the party dies before that limit has expired, it is for the jury to say whether the agent had authority to grant the extension. *Lantz vs. Ins. Co.*, 25 W. N., 356.

XXX. NEGLECT TO PROTECT THE INSURED. 1. It has become quite common for life insurance companies to insert in their policies a clause making them incontestable after three years from date. This is for the protection of the insured. This is generally supposed to be an offset to the condition against suicide. A man may be insured half a century and have paid his premiums promptly in the hope of leaving his family provided for, and may suddenly lose his mind and commit suicide. A condition against suicide in a policy would sweep away the claims of his family. *Starck vs. Ins. Co.*, 2 Northampton Co., 133. 2. Where words are susceptible of two constructions, in a contract of insurance, that construction will be adopted which will sustain the policy and prevent forfeiture. A policy of insurance, providing for a forfeiture in case the insured shall take his own life, or impair his health, is not forfeited where the insured, while trespassing on a train of cars, was thrown under the wheels and killed. *Evans vs. Relief Ass'n*, 9 Lancaster Review, 59. 1 Pa. Dist., 27.

XXXI. NEGLECT TO RECEIVE PREMIUMS. If, after receiving several premiums on a life insurance policy, the company without right refuse to receive further premiums as they

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mature, deny their obligations, and declare the contract at an end, the plaintiff may treat the contract as rescinded, and recover the premiums paid. Rescission or avoidance annihilates the contract, and places the parties in the same position, as if it had never existed; and notice that a party will not perform his contract has the same effect as a breach. *American Ins. Co. vs. McAden*, 109 Pa., 405.

XXXII. NEGLECT TO RETAIN POLICY. A creditor who held a policy on the life of a party whose whereabouts were unknown, finding it difficult to pay the premiums, accepted a paid-up policy in lieu of the original policy. Both parties acted at the time under the belief that the insured was alive, but in point of fact he was dead. Held, that the contract was not in compromise of a doubtful claim, but an agreement made under a mutual mistake of facts, and that the creditor was entitled to have the original policy reinstated. *Riegel vs. Ins. Co.*, 153 Pa., 134.

Limitations.

I. NEGLECT IN ACKNOWLEDGMENT OF CLAIM. 1. To revive a claim barred by the statute of limitations, there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay. *Miller vs. Baschore*, 83 Pa., 356. *Yost vs. Grim*, 116 Pa., 527. 2. An acknowledgment of a debt, to take it out of the statute of limitations must be unconditional, the debt must be admitted as a subsisting debt, and be so referred to as to show clearly what it is the debtor intends to pay, and must be such that a promise to pay is clearly implied. *Montgomery vs. Cunningham*, 104 Pa., 349. *Lawson vs. McCartney*, *Idem*, 356. 3. To take a case out of the statute of limitations there must be an acknowledgment of the debt, as an existing obligation, consistent with a new promise to pay it, or an express promise to do so. There must be a present intent to pay fairly to be inferred from the

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language used, though the time of payment be not immediate. *Senseman vs. Hershman*, 82 Pa., 83. 4. It is settled, that the admission must be a clear recognition of an existing debt, and so distinct and expressive as to preclude hesitation as to the debtor's meaning, and as to the particular debt to which it applies, and must be consistent with a promise to pay; but it is not necessary that there should be an express promise to pay to avoid the statute. The debt is not destroyed by the statute of limitations, but the right of action or remedy is lost. *Wesner vs. Stein*, 97 Pa., 326.

II. NEGLECT OF A PARTNER. 1. After the dissolution of a partnership, a new promise by one of the partners will not take the debt out of the statute of limitations, so as to make the copartners liable. *Reppert vs. Colvin*, 48 Pa., 248. 2. Where a firm has dissolved, no act or acknowledgment of one partner as to a firm debt will take such debt out of the statute of limitations so as to render another partner liable thereon, unless the one making such acknowledgment has taken the stock in hand and become the liquidating partner. *Wilson vs. Waugh*, 101 Pa., 233.

III. NEGLECT TO ACCEPT THE STATUTE. 1. A payment on account of an existing debt is an unequivocal acknowledgment and will take it out of the statute of limitations. An independent account against a creditor in the books of a debtor amounts to nothing. *Barclay's Appeal*, 64 Pa., 69. *Burr vs. Burr*, 26 Pa., 284. 2. In reviving a debt barred by the statute, the debtor may impose conditions by which the creditor will be bound. In a promise to pay a barred debt, the consideration is the moral obligation only, and the assumption is wholly voluntary. *Shreiner vs. Cummins*, 63 Pa., 374.

IV. NEGLECT TO ACKNOWLEDGE CLAIM. Where neither the claim nor the amount of indebtedness is stated, there is not sufficient certainty and perspicuity in the acknowledgment to take the case out of the statute. *Miller vs. Baschore*, 3 W. N., 402.

V. NEGLECT TO APPLY. 1. In an action against an

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administrator to recover a debt of a decedent, he may plead the statute, although less than six years had elapsed since the death of the debtor. *Bartolett vs. Albright*, 1 Schuylkill Record, 198. 2. The statute of limitations does not avail a wrong-doer who has received the profits of his fraud, and has so concealed his acts that his very offence serves to protect him from its consequences. *Philadelphia vs. Brown*, 19 Phila., 379.

VI. NEGLECT TO BE AVAILABLE. The statute of limitations does not begin to run until a right of action is complete. A cause of action does not exist unless there be a person in existence capable of suing or being sued. The statute begins to run at the date the suit may be commenced, and once begun it is not stayed by a party's death. If no action accrued prior to the death, none accrues until a grant of administration, and the statute runs from such grant. *Marsteller vs. Marsteller*, 93 Pa., 350.

VII. NEGLECT TO DEMAND PAYMENT OF A DEBT. The limitation of the statute is not usually to be extended by the negligence of the party who claims to be excused from it. A debt is not saved from it because made payable on demand, and it is decided that a demand will be presumed to have been made in a reasonable time. *Waterman vs. Brown*, 31 Pa., 161.

VIII. NEGLECT TO GIVE NOTICE OF CLAIM. If an act on the part of the creditor, such as demand or notice, be requisite to complete his cause of action, such act must be done within six years from the date of the contract. *Morrison vs. Mullin*, 34 Pa., 12.

IX. NEGLECT TO INSTITUTE ACTION. Where criminal proceedings have been taken against a party, the statute of limitations does not commence to run against a civil action relating to the same cause, until the criminal case has been terminated. *Hutchinson vs. Bank*, 41 Pa., 42.

X. NEGLECT TO INVOKE STATUTE. 1. An administrator may pay a debt that is barred by the statute of limitations. *Anderson's Appeal*, 3 Walker, 497. 2. To take a case out of

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the statute of limitations, there need be no express promise to pay, but there must be a clear and definite recognition of the debt, with the amount named or so referred to as to be capable of ascertainment. The acknowledgment must clearly show the debtor's meaning, and the particular debt to which it applies, and it must be made to the creditor himself or his known agent. *Barney's Estate*, 15 Phila., 540. *Patterson vs. Neuer*, 165 Pa., 66. 3. The express promise of a decedent will prevent the bar of the statute, if it is definite and precise, if it fixes a time for payment, and refers to an existing indebtedness identified and admitted. *Bond's Estate*, 3 Pa. County, 263. 4. A bill being presented by a creditor to his debtor, the latter said that he could not pay it then, but would call in a few days and pay. Held, sufficient to remove the bar of the statute of limitations. *Bond's Estate*, 18 Phila., 179. 5. To take a debt out of the statute of limitations, a subsequent acknowledgment must not only be clear, distinct and unequivocal of the existence of a debt, but it must also be plainly referable to the very debt upon which the action is based. *Burr vs. Burr*, 4 *Pittsburg Journal*, 477. *Johns vs. Lantz*, 17 *Idem*, 90. *Bradford vs. Guthrie*, 17 *Pittsburg Journal*, 113. *Gerhard vs. Gerhard*, 2 *Lancaster Review*, 9. *Hartman's Estate*, 8 *Montgomery Co.*, 81. 6. Proof of the payment of money, or of an acknowledgment of indebtedness which does not identify the debt, is insufficient to take a claim out of the operation of the statute of limitations. *Chapman's Appeal*, 122 Pa., 331. 7. Where an indebtedness is barred by the statute of limitations, an acknowledgment of the debt and declaration of intent to pay the same made to strangers, does not toll the statute. *Danner's Estate*, *Lehigh Valley Rep.*, 422. 8. A payment of interest or a payment on account, in order to bar the statute of limitations, must be shown to have reference to the very debt in dispute. Admissions on the part of the debtor must show that they undoubtedly referred to the debt in question. *De Haven's Estate*, 16 Phila., 247. *Schoeninger's Estate*, *Idem*, 384. 9. An executor or adminis-

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trator can pay a debt barred by the statute of limitations, except when forbidden by a devisee or other party in interest. *Eman's Orphan House vs. Kendig*, 1 Pearson, 34. 10. To revive a claim barred by the statute of limitations, there must be a clear and definite acknowledgment of the debt, a specification of the amount due, and an unequivocal promise to pay. *Haney's Estate*, 2 York Record, 105. 11. To take a case out of the statute, the acknowledgment must be so distinct and palpable in its extent and form as to preclude hesitation. A naked admission of indebtedness, not indicating the amount or nature of the debt, or a promise to pay something without a reference to the sum to be paid is insufficient. *Johns vs. Lantz*, 63 Pa., 324. *Wolfensberger vs. Young*, 47 Pa., 516. 12. No one can be compelled to plead the statute of limitations. *Kaufman's Appeal*, 35 Pittsburg Journal, 194. 13. It is not a fraud in law for an executor to confess a judgment for a *bona fide* debt barred by the statute. If sued therefor, he has a right to plead the statute, but is not bound to do so, and other creditors have no right to interfere except for fraud or collusion against them. A debtor, though insolvent, is not bound to interpose the defence of the statute of limitations or the statute of frauds, and may confess judgment for a claim so barred, if the claim be honest, even though other creditors are defeated thereby. *Keen vs. Kleckner*, 42 Pa., 529. *Woods vs. Irwin*, 141 Pa., 278. 14. Evidence of part payment of a claim must be so full and precise as to distinctly show that the payment was made on account of the very debt which is in dispute. *Kunkel vs. Kolb*, 25 Pittsburg Journal, 202. 15. A promise to pay when able is not sufficient to take a case out of the statute of limitations. *Lord vs. Hough*, 2 Phila., 350. 16. The acknowledgments of a debtor to toll the statute must identify the debt and be made to the creditor or his agent. *Landis' Estate*, 10 Montgomery Co., 38. 17. A promise to pay a debt barred by the statute of limitations, will operate to remove the bar of the statute only when the particular debt is unequivocally identified and acknowledged by the debtor at the time

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of the promise. Any uncertainty in this particular is fatal. *Landis vs. Roth*, 109 Pa., 621. 18. A promise made on Sunday to pay a debt will not remove the bar of the statute of limitations. *Linn's Estate*, 2 Pearson, 487. 19. To take a case out of the operation of the statute of limitations, it is not essential that the promise to pay should be actual or express. A clear, distinct and unequivocal acknowledgment of a debt suffices. It must be an admission consistent with a promise to pay. If so, the law will imply a promise without its having been actually made. There must be no uncertainty as to the particular debt. *Palmer vs. Gillespie*, 95 Pa., 340. 29 Pittsburgh Journal, 3. *Yost vs. Grim*, 116 Pa., 527. *Macrum vs. Marshall*, 129 Pa., 506. 20. In order to remove the bar of the statute of limitations, the promise, if express, must be a clear, distinct and unequivocal acknowledgment of the particular debt. It must identify the debt, either in express terms or by reference to something by which its nature and amount can be definitely and certainly ascertained. *Painter's Appeal*, 18 W. N., 441. *Shaeffer vs. Hoffman*, 115 Pa., 1. *Hostetter vs. Hollinger*, 117 Pa., 607. *Union Engine Co. vs. Douglas*, 12 W. N., 11. 21. To take a debt out of the statute of limitations, the acknowledgement must be express of a subsisting debt. It must be an unequivocal admission of indebtedness. "I agree to settle this bill with E," written at the foot of the bill and signed by the debtor, is not sufficient, as it is a mere agreement to adjust, and supposes examination into the accounts. *McClelland vs. West*, 59 Pa., 487. 22. In order to take a case out of the statute of limitations the acknowledgment must be clear and unequivocal. A promise, even in writing, to "attend to it," to "fix" it, or "settle it," will not suffice. *Weaver vs. Weaver*, 54 Pa., 152. *Seybert vs. Hicks*, 11 Lancaster Bar, 175.

XI. NEGLECT TO PLEAD THE STATUTE. Though part of a debt for which a judgment is given is barred by the statute of limitations, yet if the claim be honest, the defendants are not bound to interpose the statute, and the judgment is valid ; so

Limitations—Continued.

if a part of a claim be founded on a moral obligation not enforceable in law, the judgment is nevertheless good. *Keen vs. Kleckner*, 42 Pa., 529. 2. To avoid the plea of the statute of limitations, in an action on a note brought more than six years after maturity, the evidence of a new promise or of an acknowledgment of the debt and a promise to pay it must be clear and satisfactory ; and it holds good though the promise and acknowledgment were made after the six years from maturity of the original contract. *Yaw vs. Kerr*, 47 Pa., 333.

XII. NEGLECT TO PLEAD THE STATUTE SPECIALLY. The act of April 10, 1848, limiting the time in which prosecutions can be commenced for misdemeanors, must be pleaded specially, if the defendant wishes to avail himself of its provisions. By the common law, no length of time barred a crime or the recovery of a claim. All limitation of remedies are created by statute. *Comm. vs. Hutchinson*, 2 Parsons, 458.

XIII. NEGLECT TO SUE. The residence of the defendant in another part of the United States does not prevent the running of the statute of limitations in his favor. The words "beyond sea," in the act of July 30, 1842, refers to foreign countries. *Gonder vs. Estabrook*, 33 Pa., 374.

Liquors.

I. NEGLECT IN FURNISHING. 1. In order to convict a defendant for furnishing liquors to a person of known intemperate habits, it is necessary to prove that he knew of the existence of such habits. *Comm. vs. Wilhelm*, 6 Pa. County, 30. 2. The act of May 8, 1854, prohibits the wilful furnishing of intoxicating drinks as a beverage to a person when drunk. The person furnishing such liquors shall be held civilly responsible for any injury to person or property resulting therefrom, and any one aggrieved may recover full damages in an action on the case. *Veon vs. Creaton*, 27 W. N., 57. *Bradford vs. Boley*, 167 Pa., 506.

II. NEGLECT IN SELLING. 1. Under the liquor license laws,

Liquors—Continued.

all sales of intoxicating liquors at retail must be open, public and over the bar. The licensee must give the place his personal attention, direction and control. *Adams County Licenses*, 5 Pa. County, 26. 2. A defendant, committed upon a *ca. sa.* on a judgment for the penalty of selling liquor on Sunday, under the act of February 26, 1855, can only be discharged by virtue of the insolvent laws. *Comm. vs. McAleese*, 2 Pa. Dist., 499. 3. The sale of liquor on Sunday is punishable by fine and imprisonment, and the court has no discretion to remit the latter. *Comm. vs. Shade*, 1 Woodward's Decisions, 44. 4. Under the act of May 13, 1887, restraining the sale of liquors, the furnishing of liquor by the steward of an unlicensed club to a member who pays for the drink exceeding its cost, is a sale, and the steward may be convicted of selling liquor without a license, although the receipts are paid into the club treasury. *Comm. vs. Tierney*, 29 W. N., 194. 5. In an indictment under the Sunday liquor law, it must be shown that the liquor was sold on Sunday, at defendant's house, and it is for the jury to decide whether it was done by his permission. *Comm. vs. Valer*, 1 Luzerne Register, 381. 6. Under the act of April 12, 1875, a justice of the peace has no jurisdiction in an action by a wife for damages against a hotel-keeper for furnishing liquors to her husband, after notice in writing by her. *Irvine vs. Henry*, 2 Pa. County, 336. 7. One who is prosecuted for selling liquor without license, cannot successfully defend himself by showing it was sold by his wife in a part of the house used by her as a store. *State vs. McDaniel*, 7 Luzerne Register, 23.

Logs.

NEGLECT TO SECURE. 1. Although logs be voluntarily put loose in the river Susquehanna, they cannot be forfeited to a captor under the acts of March 20, 1812, and December 11, 1866, without notice to the owner. *Wendt vs. Craig*, 67 Pa., 424. 2. So where logs are carried adrift by floods. *West Branch Exchange vs. Enterline*, Northumberland Co. News, 269.

Lost Property.

NEGLECT TO RESTORE. The finder of lost property has a valid claim to the same against all persons but the true owner. Where a servant found in the parlor of a hotel a bundle of bank bills and handed them to the proprietor, who failed to find the owner, held, that the servant was entitled to recover the amount from the innkeeper. *Hamaker vs. Blanchard*, 90 Pa., 377.

Lunatics.

I. NEGLECT IN ENDORSING NOTE. A lunatic, who is an accommodation endorser without consideration upon a promissory note, and who has derived no advantage therefrom, is not liable to a *bona fide* holder, although he had no notice of his lunacy. *Wirebach vs. Easton*, 10 W. N., 143.

II. NEGLECT IN THE FINDING OF JURY. The finding by a jury of inquest in lunacy or habitual drunkenness proceedings, is only *prima facie* evidence, and may be rebutted by other testimony. *Miskey's Appeal*, 107 Pa., 611.

III. NEGLECT IN THE INQUISITION. An inquisition in lunacy will not be quashed because of a previous unreturned commission issued five years previously to which no return was made. *Gensemer's Estate*, 170 Pa., 102.

IV. NEGLECT OF LUNATIC IN CONVEYING PROPERTY. A grantor in a deed may avoid his conveyance by proof that he was *non compos mentis* at the time of its execution, where there is no evidence of its ratification after his restoration to reason. *Crawford vs. Scovell*, 94 Pa., 48.

V. NEGLECT OF NOTICE OF PROCEEDINGS. 1. A finding in lunacy is void without notice. A man's liberty, character and estate should not be swept away from him without a hearing or opportunity of defence. The act of June 13, 1836, forbids a foreign committee to interfere with the person or estate of a lunatic resident within this state. *Comm. vs. Kirkbride*, 7 Phila, 8. 2. Want of reasonable notice to the alleged lunatic is fatal to the proceedings to declare such a person a lunatic. *May's Case*, 10 Pa. County, 283. *Comm. vs. Groh*, Idem, 557.

Lunatics—Continued.

VI. NEGLECT OF COMMITTEE. Neglect and waste of the lunatic's estate, excessive expenditures for his support, refusal to surrender possession of his lands and goods when lawfully required, as well as embezzlement of his funds, are violations of the duties of the trust. *Strock vs. Comm.*, 90 Pa., 276.

VII. NEGLECT OF COMMITTEE IN INVESTING FUNDS. The committee of a lunatic can only protect himself from risk, when he invests the trust funds in real or government securities, or makes the investment in pursuance of an order of the court. He should not mingle trust funds with his own money. *Johnson's Estate*, 11 W. N., 387. *Frankenfield's Appeal*, 102 Pa., 589.

VIII. NEGLECT TO EXECUTE CONTRACTS. Persons not *sui juris* or not having capacity to contract debts, are liable for torts and may bind themselves for necessities. An executed contract by a merchant for the purchase of goods cannot be avoided by proof of insanity at the time of the purchase, unless a fraud was committed on the lunatic by the vendor, or he had knowledge of his condition. *Lancaster Co. Bank vs. Moore*, 78 Pa., 407.

M

Machinery.

I. NEGLECT IN CONSTRUCTION. 1. Where a workman, for a full consideration, undertakes to manufacture an article of machinery, knowing where it is to go, and what work it is expected to do, and then so carelessly constructs the article that it is not able to do the work expected and breaks, damaging adjacent property, he is liable in an action of case for the resulting damage. *Erie City Iron Works vs. Barber*, 102 Pa., 156. 2. In an action to recover money paid for machinery alleged to be defective, evidence is admissible of delay in giv-

Machinery—Continued.

ing notice of such defects, and of the time when the plaintiff became aware of them. *Fearl vs. Hanna*, 129 Pa., 588.

3. Where one contracts for a machine which, when delivered, proves defective, it is the duty of the purchaser to return the machine at once to the maker, or at least to notify him of the defect. If he neglect to promptly do this, he is liable for the full value of the machine. *Frankenfeld vs. Freyman*, 13 Pa., 56.

4. Even where there is negligence in a maker of a machine, he is not liable to a third person for an injury received whilst the machine is being operated by a purchaser, unless the act of the defendant was the proximate cause of the injury.

Osten vs. Morris, 17 Phila., 219. 5. Where a master furnishes his servant with defective machinery, and an accident occurs, placing the servant in such peril, as not to allow him sufficient time for reflection, and the servant in endeavoring to save the machinery commits an error of judgment, without which he would not have sustained injury, held, that such error would not charge the servant with contributory negligence, or preclude him from recovering against the master. *Schall vs. Cole*, 107 Pa., 1.

6. The ground of an employer's liability for injuries received by an employee while operating machinery, is not danger, but negligence. The test of negligence, in respect of machinery, is the usage of the business, and where there is a failure to show that the machinery was negligently constructed and how the injury occurred through its operation, the employer is not liable. *Simpson vs. Locomotive Works*, 139 Pa., 246. *Titus vs. R. R.*, 136 Pa., 618. *Ford vs. Anderson*, 139 Pa., 263.

II. NEGLIGENCE IN LOCATING. Plaintiff sued the city for negligence in suffering machinery to remain near a sidewalk on a public lawn, in such a position that a large wheel fell upon and injured the plaintiff, a boy of nine years, who stepped off the walk and touched it or played with it. In this case, the city did not place the machinery on the lawn. It was placed here by a manufacturing company, and hence the city was not liable for the injury, as the wheel was not standing on

Machinery—Continued.

the public highway, and was not an obstruction to travel. *Mattimore vs. Erie*, 144 Pa., 14.

III. NEGLIGENCE IN OPERATING. 1. The operation of a manufactory by day and night, which necessarily causes some noise and vibration in a neighboring dwelling, will not be restrained by injunction, where the noise of the machinery does not constitute an unjustifiable nuisance to the complainant. *McCaffrey's Appeal*, 105 Pa., 257. 2. A visitor in a foundry was struck and injured by the falling of some iron plates, which were being moved with a crane. There being no evidence of negligence on the part of the defendant, a nonsuit was entered. *McLean vs. Burnham*, 19 W. N., 53. 3. An employee assumes the risk of his employment. All machinery is dangerous if not properly used. Where the danger is obvious, a boy of fourteen may know as much of such danger as an adult. If a boy be not allowed to use machinery until he has become accustomed to its use, it would be difficult for him to learn any useful trade. *O'Keefe vs. Thom*, 24 W. N., 379. 4. Where machinery is improperly constructed, and its use dangerous, which fact is known to the engineer employed, and where such machinery breaks and injures a workman engaged in the same general business, the employer is not responsible. The proximate cause of the injury was the carelessness of the engineer, who was a fellow-servant of the injured man, in running the engine when it was dangerous. *Phila. Iron & Steel Co. vs. Davis*, 111 Pa., 597. 5. Mere discomfort and annoyance, without substantial injury to property or business, suffered from the noise and vibration of machinery in conducting lawful business in a neighborhood devoted exclusively to manufacturing purposes, are not sufficient to justify the issuing of an injunction. *Straus vs. Barnett*, 140 Pa., 111. 6. From the fact that a particular method or appliance is dangerous, it does not follow that it is negligence for an employer to use it. The unbending test of negligence in methods and machinery is the ordinary usage of the busi-

Machinery—Continued.

ness. A master is not bound to use the newest and best appliances. *Titus vs. R. R.*, 136 Pa., 618.

IV. NEGLIGENCE IN PROVIDING. 1. An employer is not bound to supply his employees with appliances not in general use. He has discharged his duty when he furnishes them with such tools and appliances as with ordinary and reasonable care may be used without danger. An employee who continues to use a machine which he knows to be dangerous, takes upon himself the risk of injury therefrom; but this rule is inapplicable if the risk does not threaten immediate danger, and the master has promised to remedy the defect. An employer is not bound to insure against accidents. *Lehigh Coal Co. vs. Hayes*, 128 Pa., 294. *Bromfield vs. Hughes*, *Idem.*, 194. *Philada. & Reading R. R. vs. Hughes*, 119 Pa., 301. *Schaffer vs. Haish*, 110 Pa., 575. 2. An employer is not bound to furnish the safest machinery for his workmen, nor to provide the best methods for its operation in order to save himself from responsibility for accidents resulting from its use. If the machinery be of ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required. *Payne vs. Reese*, 100 Pa., 301. 3. It is the duty of every employer to exercise care in providing his laborers with safe machinery, suitable tools and appliances adapted to the uses for which they are designed. *Mullen vs. Phila. Steamship Co.*, 78 Pa., 15.

V. NEGLIGENCE IN REMOVING. The removal of machinery from a mill in order to give a preference to junior over senior judgment creditors is a fraud upon the latter, and will turn the property from real into personal. The proper remedy of the older lien creditors is by ruling the proceeds of the sale into court, not by an injunction to restrain the sale. *Steinmetz vs. Witmer*, 1 Pearson, 524.

VI. NEGLIGENCE IN REPAIRING. A master is bound to furnish his servants with such machinery as is reasonably safe and suitable for the work. If he employs other servants not in the same department to construct or repair such machinery, he

Machinery—Continued.

is responsible to his servants who use the machinery for any negligence in the work of construction or repairing. These agents cannot be regarded as fellow-servants. *Penna. & N. Y. Canal Co. vs. Mason*, 109 Pa., 296.

VII. NEGLECT TO REMOVE. 1. A court of equity has no jurisdiction to direct the removal by defendant of machinery left by permission on the premises of the complainant, and claimed by the defendant to be properly there. *Barclay's Appeal*, 93 Pa., 50. 2. A party having machinery in a building, wrongfully refused to remove the same when requested by the purchaser of the building so to do. In an action of case brought by the purchaser, held, that the measure of damages was not what it would have cost the plaintiff to remove the machinery, but the actual loss to him by being obstructed by it in using the premises, or from obtaining an income therefrom. *Barclay vs. Grove*, 21 W. N., 202. 3. Machinery erected by a lessee to carry on his business is personal property during his term; it may be sold on execution, and the purchaser may remove it before the expiration of the term. *Heffner vs. Lewis*, 73 Pa., 302.

VIII. NEGLECT TO REPAIR OR RENEW. 1. A master should provide his servant with safe tools and machinery. Any defect which may become apparent in their use should be reported by the servant to his employer. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault, not apparent when it was first provided, or for an external apparent one, produced by time and use, not brought to the master's knowledge. A different rule, however, prevails when the tool or machinery is perishable, as in a rope used for years upon a derrick. In such case it is the master's duty to renew it at proper intervals. *Baker vs. R. R.*, 95 Pa., 211. 2. Where an employer is informed that certain machinery on his premises, out of sight of his workmen, is in a dangerous condition, and he takes steps to renew the same, but before the renewal is made, one of the employees, having no notice of the dangerous condition of the machinery, is injured by its

Machinery—Continued.

breaking while in ordinary use, in a suit by the workman, the question of the employer's negligence must be left to the jury. *Murphy vs. Crossan*, 98 Pa., 495. 3. Where the defect in the machinery is presumably not known to the master, it is the duty of the servant to give him notice; neglect of this relieves the master of responsibility should the servant be injured thereby. *Patterson vs. Pittsburg R. R.*, 76 Pa., 390. *Mansfield Coal Co. vs. McEnery*, 91 Pa., 194. *N. Y. & Lake Erie R. R. vs. Lyons*, 119 Pa., 324.

Malicious Prosecution. See "PROSECUTION."

I. NEGLIGENCE OF PROBABLE CAUSE. 1. What constitutes probable cause is a mixed question of law and fact. The jury determines what facts are proved, but the court decides whether they amount to probable cause. *Beach vs. Wheeler*, 30 Pa., 72. 2. To support an action for malicious prosecution, both want of probable cause for the prosecution and malice in the prosecutor must be shown. *Bernar vs. Dunlap*, 94 Pa., 329.

Mandamus.

I. NEGLIGENCE IN ISSUING. Where in a petition for a mandamus, a good *prima facie* case appears, the ordinary practice is to direct an alternative mandamus. When, however, a rule to show cause why a peremptory mandamus should not issue is granted and served, the court may in a proper case issue a peremptory mandamus in the first instance. *Comm. vs. Hyde Park*, 15 W. N., 506.

II. NEGLIGENCE IN PETITION FOR. The petition for the writ must state the facts on which the right is made to depend, with a precision sufficient to express the right of one and the duty of the other, in such manner that the ordinary mind may reasonably apprehend them. Certainty to a common intent is the rule, and that applies as well to the answer as to the petition. *Central District Telegraph Co. vs. Comm.*, 114 Pa., 592.

III. NEGLIGENCE IN THE RETURN. Every allegation in the

Mandamus—Continued.

return to a mandamus must be direct, and be stated 'in the most unqualified manner—not inferentially or argumentatively, but with certainty and plainness. Otherwise, it may be demurred to. *Comm. ex rel. Thomas vs. Commrs.*, 32 Pa., 218. *Comm. vs. Chittenden*, 2 Pa. Dist., 804.

IV. NEGLECT IN SERVING WRIT. A writ of mandamus should be served by giving the original writ to the defendant. Where more than one person is to be served, copies should be given to each of them, at the same time showing them the original writ, and leaving the original with one of the defendants. It does not seem to be necessary that the writ should be served by the sheriff. *Comm. vs. Brady*, 6 Phila., 121. *Comm. vs. Union Township Overseers*, 4 Kulp, 87.

V. NEGLECT TO GRANT. 1. The writ of mandamus will never be granted to compel the specific performance of an application, where it is apparent that the attempt would prove unavailing and impossible of attainment. *Comm. vs. Coal Co.*, 6 Lancaster Review, 107. 2. A mandamus is never awarded where there is another remedy. It is never to be used only as a process of the last resort. *Comm. vs. Commissioners*, 2 Parsons, 223. *Birmingham Ins. Co. vs. Comm.*, 92 Pa., 77. *Comm. vs. Thomas*, 163 Pa., 446. *Comm. vs. Walton*, 3 Pa. Dist., 391. 3. On a rule to show cause why a writ of alternative mandamus shall not issue, the only question to be considered by the court is the sufficiency of the petition. *Comm. vs. Heck*, 1 Northampton Co., 393. 4. In Pennsylvania, mandamus will not lie at the instance of a private citizen to enforce the performance of a public duty, unless the relator shows some special or personal interest in having that duty performed. The law is different in this respect elsewhere. *Comm. vs. McAllin*, 33 Pittsburg Journal, 152. 5. A mandamus will not lie to compel the performance of an act by a person clothed with a discretion to determine the necessity of such act, and the time and circumstances which call for its performance. *Comm. vs. McMichael*, 10 Phila., 445. 6. He who sues for the writ of mandamus must have some well-defined right

Mandamus—Continued.

to enforce, which is specific, complete and legal, and for which there is no other specific legal remedy, and he must claim a right independent of the public. *Comm. vs. Mitchell*, 82 Pa., 343. *Comm. vs. Guardians of Poor*, 13 W. N., 61. *Boyer vs. Saving Fund*, 1 Schuylkill Record, 231. 7. The tendency in modern times is to grant a mandamus in certain cases where formerly it would have been refused. It may be issued to compel an inspection of papers, where the circumstances warrant it. *Comm. vs. Phœnix Iron Co.*, 105 Pa., 117. *Guarantee Trust Co., In re*, 34 W. N., 16. 8. The writ of mandamus only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy, and it is never granted in a doubtful case. It will lie to compel the performance of duties clearly ministerial in their nature, with no element of discretion in their performance. *Office Specialty Co. vs. Monroe Co.*, 3 Northampton Co., 224.

VI. NEGLECT TO OBEY. Where the defendant has refused or neglected to obey a peremptory mandamus, the proper course is to take a rule to show cause why he should not be attached for contempt. *Senior vs. Douglass*, 14 W. N., 454.

Manslaughter.

NEGLECT OF CRIMINAL INTENT. If a man throw a stone into the highway, which strikes another, and death results, the party doing such negligent act may be convicted of manslaughter, though he had no intention whatever to injure any one; and if death do not result, he may be convicted of assault and battery. *Comm. vs. Fleet*, 8 Phila., 614.

Marine Insurance. See "INSURANCE—MARINE."

I. NEGLECT IN CONVEYING PETROLEUM. Where the proximate cause of the loss is one of the perils insured against, although the remote cause was the negligence of the assured, his agents or servants, the underwriters are liable, if there have been no fraudulent or barratrous design. In this case, the

Marine Insurance—Continued.

effort was made to show that the assured had deviated or departed from their contract as to the storage of the barrels of oil on the vessel. *Phoenix Fire Ins. Co. vs. Cochran*, 51 Pa., 143.

II. NEGLECT IN REPRESENTATIONS. It is an established principle in marine insurance, that the misrepresentation or concealment of a fact material to the risk will avoid the policy, although no fraud was intended, and the misrepresentation innocently made. But it is denied in many decisions, that this principle extends to policies against loss by fire, and it certainly does not extend to life insurances, unless the policy contained an express provision that the representation was to be the basis, or a condition, of the contract. *Aicher vs. Ins. Co.*, 13 Phila., 139. 6 W. N., 332.

III. NEGLECT IN USING EXPLOSIVES. Where a boat was destroyed by fire, the result of pouring turpentine over the coal used in the furnace, the object being to quickly generate steam to accelerate the speed of the boat in a race with another vessel, held, to be gross negligence. *Ins. Co. vs. Marsh*, 5 Wright, 386. 2 Pittsburg, 273.

IV. NEGLECT OF INSURABLE INTEREST. As a general rule, whatever furnishes to the assured a reasonable expectation of pecuniary benefit from the continued existence of the subject-matter of insurance, is a valid insurable interest therein, and the right of property is not always an essential ingredient. The owners of a vessel and its cargo engaged in a joint venture are in the relation of partners in the venture, each having a lien on the vessel and cargo; wherefore such part owner has an insurable interest in the joint venture, validating an insurance in the same, to the extent of his advancements and disbursements. *International Ins. Co. vs. Winsmore*, 124 Pa., 61.

V. NEGLECT OF NOTICE OF OTHER INSURANCE. Where a condition exists in a policy of insurance, that notice of other insurance must be given by the assured and endorsed on the policy or otherwise acknowledged by the company, such con-

Marine Insurance—Continued.

dition is waived, when the insurers with full knowledge that other insurance has been obtained, continue to treat the contract as existing in force. *Eureka Ins. Co. vs. Robinson*, 56 Pa., 268.

VI. NEGLECT OF UNDERWRITERS. A vessel insured on a valued policy for one-third its value was wrecked, and the underwriters paid for it as a total loss. The underwriter, after examination of the wreck, determined it was not worth the expense of raising, but did not prevent the insured from raising it. Held, that the underwriters were not bound to look after the interests of the insured, and not having received anything from the wreck were not liable to the insured for any part of its value. *Allegheny Ins. Co. vs. Ransun*, 69 Pa., 496.

VII. NEGLECT TO PURSUE DESIGNATED COURSE. A deviation or change of voyage, not authorized by a policy of marine insurance, defeats the insurance. A well-settled distinction exists between the cases of a proposed deviation and an abandonment of the voyage. If the loss occurs before an actual deviation, the underwriter is not discharged. An abandonment of the voyage, and the substitution of another and a different voyage at once defeats the policy. *Dallam vs. Ins. Co.*, 6 Phila., 15.

Marriage..

I. NEGLECT IN MARRYING MINORS. The act of 1730 forbids, under a penalty of fifty pounds, the marriage of minors without the consent of their parents, but as amended by the act of 1871, the burden of proof is on the plaintiff to show that the officiating clergyman knew, or might have known, that one of the parties was a minor. *Fulkerson vs. Day*, 15 Phila., 638. *Reed vs. Martin*, 15 W. N., 177.

II. NEGLECT OF CONSENT. 1. A promise to marry a minor does not require the consent of the parent or guardian to make it binding. Articles of marriage settlement are binding upon the husband, though the wife be a minor at the time. *Beelman vs. Rush*, 26 Pa., 509. *Whichcote vs. Lyle*,

Marriage—Continued.

28 Pa., 73. 2. An arrest or imprisonment, under void process, or under a warrant issued upon a false charge, will avoid a marriage which is constrained by the duress of the imprisonment. *Collins vs. Collins*, 2 Brewster, 515. 3. The force and coercion, to invalidate a marriage, must be shown to amount to duress *per minas*. There must be actual force by imprisonment, and putting in fear or threats of life or of great bodily harm. *Stevenson vs. Stevenson*, 7 Phila., 386.

III. NEGLECT OF FORMAL CEREMONY. 1. Cohabitation, reputation and admissions are circumstances from which marriage may be inferred, and in some cases they are of the most conclusive character. In cases where the fact is in dispute between the parties themselves, the proof of this kind must be very much greater than where it is set up by innocent third parties. Admissions and declarations, if made to subserve a mere temporary purpose, as to induce servants to live with the parties, to quell the suspicions of keepers of inns, or to secure respectful treatment in public conveyances, or to satisfy the too prying curiosity of strangers, would have infinitely less importance than if made in the family circle. *Brinckle vs. Brinckle*, 12 Phila., 232. 2. A marriage in Pennsylvania may be proved by cohabitation and reputation that the parties lived together as man and wife. Marriage in this state is purely a civil contract, and no prescribed ceremony is requisite to its validity. It may be proved by the testimony of witnesses present at the time the contract was entered into, but in its absence a presumption of marriage arises from the conduct, admissions and declarations of the parties respecting each other. *Brice's Estate*, 23 Pittsburg Journal, 52. 11 Phila., 98. *Lehigh Valley R. R. vs. Hall*, 61 Pa., 361. 3. Marriage is a civil contract requiring the express assent of the contracting parties by words in the present tense. It is valid without the intervention of a clergyman or an officer. It must be clearly proven by evidence outside the parties, and be followed by cohabitation. *Comm. vs. Cronin*, 13 W. N., 76. 4. An admission by the husband that he had lived with a woman as husband and

Marriage—Continued.

wife for ten years, and had publicly acknowledged her to be his wife, is sufficient proof of the marriage. *Comm. vs. Litsenberger*, 15 Phila., 414. 5. Where there is no proof of actual marriage, cohabitation and reputation are necessary to ground a presumption of marriage; proof of cohabitation alone is insufficient. Reputation consists of the speech of the people who know the parties. Marriage must be evidenced by words in the present tense, uttered for the purpose of establishing the relation of husband and wife. *Comm. vs. Stump*, 53 Pa., 132. 6. While satisfactory evidence that cohabitation had at any time been meretricious will eliminate subsequent cohabitation as a fact from which marriage may be inferred, yet indirect evidence of a meretricious cohabitation will not have that effect. *Drinkhouse's Estate*, 151 Pa., 294. 7. The repute of marriage must be general; the conduct of the parties must be such as to make almost any one infer that they were married. Cohabitation and repute are not necessarily sufficient; there should be constancy of dwelling together. *Green's Estate*, 5 Lancaster Review, 217. 8. Cohabitation may exist without matrimony, and admissions of marriage may be made to avert suspicion or to secure a temporary convenience. The intention with which the parties came together is the test. If they in any manner expressed a purpose to cohabit as man and wife, no other evidence is needed; if they did not, no amount of testimony will convert an intercourse which was meant to be meretricious into legal marriage. *Green's Estate*, 5 Pa. County, 605. 19 Phila., 55. 9. The consent of the parties to contract is all that is required for a valid marriage. If the contract is made *per verba de presenti*, though it is not consummated by cohabitation, or if it be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary. Marriage may be proved in civil cases by reputation, declarations and conduct of the parties, and other circumstances usually accompanying the relation. For civil purposes, reputation and cohabitation suffice as evidence.

Marriage—Continued.

Both are necessary to establish a presumption of marriage, where there is no proof of actual marriage. *Richard vs. Brehm*, 73 Pa., 140. *Greenawalt vs. McEnelley*, 85 Pa., 356. 10. Neither cohabitation nor reputation of marriage is marriage; they are simply evidence when conjoined to a presumption of marriage, which disappears in the face of proof that no marriage has taken place; nor does a relation shown to have been illicit at its commencement raise any presumption of marriage. *Grimm's Estate*, 131 Pa., 199. *Hunt's Appeal*, 86 Pa., 294. *Reading Trust Co. vs. Riegel*, 113 Pa., 204. *Strauss' Estate*, 34 W. N., 478. *Strauss' Estate*, 14 Pa. County, 596. 11. It is not necessary that a clergyman or magistrate should be present to give validity to a marriage. No peculiar ceremony is requisite to the valid celebration, but it may be completed by any words in the present time, without regard to form. Marriage may be proved by the acts, declarations and confessions of the parties. Reputation and cohabitation are sufficient evidence of marriage, and may be conclusive where the rights of third parties are affected and the legitimacy of children called in question. The presumption is always in favor of legitimacy. The essence of the engagement consists in a consent freely given by parties competent at the time to contract. The repute of marriage must be general; the conduct of the parties must be such as to make any one infer that they were married. Cohabitation and reputation should be shown to exist at the domicil of the parties. *Guardians of Poor vs. Nathans*, 3 Clark, 139. 2 Brewster, 149. *Physick's Estate*, *Idem*, 179. *Bicking's Appeal*, *Idem*, 203. *Comm. vs. Omohundro*, *Idem*, 298. *Janney's Estate*, 2 Pa. Dist., 145. *Jane Parker's Appeal*, 44 Pa., 309. 12. A marriage will not be presumed from cohabitation and reputation, where the relation between the parties was of illicit origin, in the absence of subsequent actual marriage. *Hunt vs. Cleveland*, 6 Pa. County 592. 5 Kulp, 253. *Jones vs. Jones*, 7 Kulp, 515. 13. An agreement to live together as man and wife, preceding cohabitation, followed by the

Marriage—Continued.

alleged husband's recognition of the wife, will constitute a marriage. The husband's declaration to the contrary, in the absence of the wife, are inadmissible. Cohabitation, and even the mutual acknowledgment of the parties as husband and wife, will raise no presumption of marriage, where the connection was originally illicit. *Moore's Estate*, 20 Phila., 87. *Drean's Estate*, *Idem*, 113. *Stott vs. Toledo*, 2 W. N., 98. *Brice's Estate*, *Idem*, 112. *Seibert's Estate*, 17 W. N., 271. *Moore's Estate*, 9 Pa. County, 338.

14. The validity of a marriage is to be determined by the law of the place where celebrated. *Moul's Estate*, 1 York Record, 185.

15. A marriage not begun by any formal ceremony, may be established by evidence of cohabitation, reputation and mutual acknowledgment. These circumstances may be overcome by proofs of other facts inconsistent with the existence of the marriage relation. *Seibert's Estate*, 18 Phila., 5.

16. Where a marriage in fact is proved, mere cohabitation and reputation of a prior marriage is insufficient to invalidate it; there must be a clear proof of nuptials celebrated according to law. *Shaak's Estate*, 3 Pittsburg, 275.

17. The contract of marriage may be proved by reputation and cohabitation, but where either fails, the presumption cannot be built on the other. *Smyth's Estate*, Leg. Gaz. Report, 210. 3 Lancaster Bar, No. 23.

18. In civil cases, reputation and cohabitation are admitted as evidence of an actual marriage, not as constituting themselves a legal marriage. *Tholey's Appeal*, 93 Pa., 38. *Thorndell vs. Morrison*, 4 Pittsburg Journal, 428. *Wigton's Appeal*, 5 Pittsburg Journal, 196.

19. Marriage will be presumed, where the parties have made unequivocal and frequent admissions of marriage, where there has been cohabitation and repute, where the man has supported the woman and his children, whom he has constantly recognized as his offspring, and where he has often indulged in strong expressions of attachment for her and for them. *Vincent's Appeal*, 60 Pa., 240.

20. Where parties have lived together as man and wife for years under an alleged marriage,

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void by reason of the incapacity of one of the parties to contract, and that incapacity is subsequently removed, in order to prove a subsequent expressed contract of marriage, there must be proof of words spoken by both parties in the present tense sufficient to constitute marriages. *Weitzel vs. Central Lodge*, 9 Lancaster Review, 243. 11 Pa. County, 269. 21. On a question of marriage, constancy of dwelling together is the chief element of cohabitation. Cohabitation is not a sojourn, a habit of visiting nor a remaining with for a time. Cohabitation and reputation are not marriage; when conjoined they are evidence from which a presumption of marriage arises. Cohabitation is to have the same habitation. *Yardley's Estate*, 75 Pa., 207.

IV. NEGLECT TO FULFIL CONTRACT. 1. In an action for breach of promise to marry, evidence of indiscretions of the woman, if they fall short of absolute criminality, are not sufficient to release the other party entirely from his promise. They only go in mitigation of damages. *Bowers vs. Cummins*, 1 Pittsburgh Journal, 82. 2. In *assumpsit* for a breach of a contract of marriage, the defendant offered in evidence a formal release executed by the plaintiff. Evidence in rebuttal, tending to show that the release was procured by fraud, was sufficient to warrant the submission of the fact to the jury. *Ettinger vs. Jones*, 139 Pa., 218. 3. Where a man enters into an engagement of marriage, he has a right to presume that the woman's physical condition is such as to permit sexual intercourse. If it is not such, it is a sufficient defence to an action for a breach of promise of marriage. *Gring vs. Lerch*, 112 Pa., 244. 4. A civil contract of marriage is binding in Pennsylvania between the parties, only when entered into with full consent, *per verba in præsenti*. A mere reference to past connection, or a promise to perform an act in the future, will not suffice. *Hantz vs. Sealy*, 6 B., 405. 5. When, in a suit for breach of promise of marriage, plaintiff establishes a promise and breach with loss, a *prima facie* case is made out. This throws the burden of vindicating himself upon the defendant. If a woman

Marriage—Continued.

engaged to be married acts immorally with any man other than her affianced, it will bar her action. If, however, her immoral conduct was connived at by him, or knowing her to be an immodest woman, he entered into a marriage engagement with her, she is not precluded from recovering for the breach. *Johnson vs. Smith*, 3 Pittsburg, 184. 6. The fact that a contract of marriage was entered into on Sunday, will not invalidate it if there be subsequent recognition of it by the parties. In a suit for breach of promise of marriage, the jury may fix the damages without knowing the financial means of either plaintiff or defendant. Evidence of coarse and mercenary language used by the plaintiff after the time of the alleged breach is inadmissible. *Markley vs. Kessering*, 2 **Penny-packer**, 187. 7. An agreement to marry may be established by evidence of a formal undertaking by positive words, or of circumstances from which it may be inferred. A man is not bound by a contract to marry a lewd woman, if he has entered into it in ignorance of her character. *Van Storch vs. Griffin*, 77 **Pa.**, 504. 8. A contract to marry without specification of time, is a contract to marry within a reasonable time. The age of the parties and the pecuniary ability of the man to support a family are to be considered. A refusal to fulfil a contract to marry may be as unmistakably manifested by conduct as by words. It is not necessary that the plaintiff should offer to marry the defendant and he expressly refuse, if his acts and declarations dispense with the necessity of the request. *Wagenseller vs. Simmers*, 1 **Chester Co.**, 217. 10 **W. N.**, 353. 97 **Pa.**, 465.

V. NEGLECT TO OBTAIN LICENSE. A license to marry may be obtained not only in the county where the marriage is to be performed, but also in the county of the residence of either of the parties to it. The penalties for ministers and justices of the peace for marrying parties without obtaining proper license, are payable to the counties, and not to the state. *Marriage License Acts, In re.*, 15 **Pa. County**, 345.

Marriage Settlements.

NEGLECT TO INSERT POWER OF REVOCATION. Where, in contemplation of marriage and with the consent of her intended husband, a woman under advice of counsel made a deed of settlement of all her estate, the trustees to pay her the income during her life for her separate use, but through mistake omitted to insert a power of revocation, held, that after her husband's death, the beneficiaries being volunteers, the wife was entitled to relief in equity, and the trustees should reconvey the estate to her. *Russell's Appeal*, 75 Pa., 269.

Married Women.

I. NEGLECT BY MISREPRESENTATIONS. A married woman has no legal power to execute a judgment bond; nor is it made good by the fact that she represented, at the time she gave the judgment, that she was single, thereby obtaining the consideration for which it was given. *Keen vs. Coleman*, 39 Pa., 299.

II. NEGLECT IN ACKNOWLEDGMENT OF RELEASE. A release executed by a married woman of a legacy charged upon land, cannot, under the provisions of the act of April 26, 1850, be recorded unless it be separately acknowledged by her in accordance with the provisions of the act of February 24, 1770. A recorded paper, defectively acknowledged, is constructive notice to no one. *Powell's Appeal*, 98 Pa., 403.

III. NEGLECT IN ACKNOWLEDGING DEED. 1. To make the deed of a married woman valid, she must have full knowledge of its contents, no fraud be practiced upon her, no undue influence on the part of her husband, who also signs, but from whom she is examined separate and apart, and her will must have been perfectly free. *Louden vs. Blythe*, 27 Pa., 22. 2. The rule is firmly established, that if the essential requirements of the act of February 24, 1770, appear in the acknowledgment of a married woman to her deed, it is sufficient. These are a separate examination apart from her husband, her full knowledge of the contents of the deed, and her voluntary consent to its execution by herself. *Miller vs. Wentworth*, 82

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Pa., 285. *McCandless vs. Engle*, 51 **Pa.**, 309. *Graham vs. Long*, 65 **Pa.**, 383. 3. The certificate of acknowledgment to a deed, though of very high import, is not conclusive. Clear proof of fraud or imposition on the wife is admissible to invalidate it. *Postens vs. Marcy*, 4 Luzerne Register, 38. 4. The acknowledgment of a deed by a *feme covert* is not good, unless it be expressed in the certificate of the officer who took the acknowledgment that the contents of the deed were made known to her. *Steele vs. Thompson*, 14 **S. & R.**, 84. *Enterprise Co.'s Appeal*, 102 **Pa.**, 492. *Rumfelt vs. Clemens*, 46 **Pa.**, 456.

IV. NEGLIGENCE IN ACKNOWLEDGMENT OF MORTGAGE.

1. Where a certificate of acknowledgment of a mortgage by a married woman stated the separate examination of the wife, and that she acted without coercion of her husband; but instead of reciting that the contents were made known to her, stated "the contents of said indenture being first made fully to her," omitting the word "known," held to be sufficient. *Hornbeck vs. Building Association*, 88 **Pa.**, 64. 2. The certificate of a justice of the peace of the acknowledgment of a mortgage by a married woman is not conclusive, but parol evidence is admissible of duress employed, or undue means used in obtaining such acknowledgment. *Louden vs. Blythe*, 16 **Pa.**, 532. 3. Our recording acts have prescribed the form of acknowledgment necessary to be observed by married women in order to make a valid conveyance or mortgage of their interest in real estate. Courts exclude parol evidence of what passed at the time of the acknowledgment, except in cases of fraud and duress. *Michener vs. Casender*, 38 **Pa.**, 336. 4. A certificate of acknowledgment of a married woman, which fails to show that the mortgage was read or otherwise made known to her is fatally defective. *Spencer vs. Reese*, 165 **Pa.**, 158.

V. NEGLIGENCE IN APPROPRIATION OF BORROWED MONEY.

A married woman is not liable on her note for money borrowed for the avowed purpose of improving her separate estate, unless

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it be shown that the money was applied to that object. *Heugh vs. Jones*, 32 Pa., 432.

VI. NEGLECT IN ARRESTING. A *capias ad satisfaciendum* may not issue against a married woman from a judgment in an action upon a *tort* committed by her during coverture. *Vocht vs. Kuklence*, 119 Pa., 365. *Whalen vs. Gabell*, 120 Pa., 284. 2. A married woman cannot be arrested on a *capias ad respondendum*, where the cause of action occurred during her coverture. *Comm. vs. Keeper*, 11 W. N., 341.

VII. NEGLECT IN CONFESSING JUDGMENT. A bond and warrant of attorney by a married woman and her husband is void as to her. *Caldwell vs. Walters*, 18 Pa., 79.

VIII. NEGLECT IN CONTRACT. 1. The primary presumption when a wife buys necessities for the family of her husband and herself is that she is acting as his agent. In order to charge her, it must clearly appear that the goods were purchased by her on her own credit, and that they were necessities. *Hoff vs. Koerper*, 13 W. N., 539. *Ingham vs. Sickler*, 5 Legal Opinions, 31. 2. Since the passage of the married woman's act of June 3, 1887, a married woman may make any kind of a contract in relation to the improvement of her separate estate which she could make if she were a single woman. *Latrobe Loan Ass'n vs. Fritz*, 152 Pa., 224.

IX. NEGLECT IN CONVEYANCE. A deed by a married woman conveying her real estate is void, unless her husband joins in its execution. The act is imperative on this point, and it is not waived by previous abandonment by the husband. *Trimmer vs. Heagy*, 16 Pa., 484. *Peek vs. Ward*, 18 Pa., 506. *Richards vs. McClelland*, 29 Pa., 385. *Stoops vs. Blackford*, 27 Pa., 213. *Thorndell vs. Morrison*, 25 Pa., 326. *Dunham vs. Wright*, 53 Pa., 167.

X. NEGLECT IN EXECUTING WILL. 1. Under the act of April 11, 1848, the will of a married woman must be executed in the presence of two competent witnesses. *Camp vs. Stark*, 81x Pa., 235. 2. While the act provides that a husband shall not be a subscribing witness to his wife's will, yet there

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exists no prohibition against his presence at its execution. *Dickinson vs. Dickinson*, 61 Pa., 401.

XI. NEGLECT IN GIVING BOND. The judgment bond of a married woman is absolutely void, though given for debts contracted before marriage, or for necessities for the support and maintenance of her family. Her separate estate, if liable, must be reached through the proper form of action. *Keiper vs. Helfricker*, 42 Pa., 325.

XII. NEGLECT IN JUDGMENT AGAINST. A judgment given by a justice of the peace against a married woman in a joint action against the husband and wife is void, unless the record shows that the debt for which the suit was brought was contracted by the wife, and incurred for articles necessary for the support of the family of the parties. *Gould vs. McFall*, 111 Pa., 66.

XIII. NEGLECT IN LIEN ON HER SEPARATE ESTATE.

1. In order to bind a wife's property by a mechanic's lien, the claim should show her coverture, and that the work was done by her authority and consent. A wife's property is not subject to lien for work in its improvement and repair on a contract with her husband, unless done by her authority. A husband cannot encumber his wife's property without her consent, even for necessary repairs. *Dearie vs. Martin*, 78 Pa., 85. 23 *Pittsburg Journal*, 47. *Schreiffer vs. Saul*, 24 *Idem*, 2. 2. To charge the separate property of a married woman with a mechanic's lien, it must be alleged in the claim and proved on the trial that the work was necessary, for the reasonable improvement or repair of her separate estate, and was substantially so applied by her authority and consent. *Shannon vs. Shultz*, 87 Pa., 403. *Kuhns vs. Turney*, *Idem*, 497. *Germania Savings Bank's Appeal*, 95 Pa., 329. *Einstein vs. Jamison*, *Idem*, 403.

XIV. NEGLECT IN SIGNING JUDGMENT NOTE. A judgment confessed on a note with warrant of attorney, signed by a married woman, is void, except when the note is given for the purchase money of land. In such case it will be a valid lien

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on land, but not a charge against the *feme covert* personally. *Christner vs. Hochstetter*, 109 Pa., 27. *Shuyder vs. Noble*, 94 Pa., 286.

XV. NEGLECT IN SUITS AT LAW. 1. A married woman cannot carry on an action in her husband's name and her own for a tort to herself without his consent and against his wishes. *Clark vs. Koch*, 9 Phila., 109. *Orth vs. Godshalk*, 6 W. N., 32. 2. In all cases, where debts are contracted for necessities for the support of the family of any married woman, the creditor may sue the husband and wife, and after obtaining judgment, have execution against the husband alone, and if such execution be returned *nulla bona*, then execution may be issued and levied on the property of the wife. *Carn vs. Fillman*, 10 W. N., 153. 3. In suing a married woman, it is no longer necessary to allege by way of plea that the work done on her property was necessary for the preservation and enjoyment of her estate. By statutes and decisions, married women now stand on the same plane as single women, with a few exceptions, in regard to their liability for their debts, and in the same condition, when sued, as to pleading and practice. It took time to bring this about, but was a great triumph of the law-makers. *Harrar vs. Crony*, 32 W. N., 92. 4. A judgment against a married woman before a justice, which does not affirmatively show her liability on a contract within the statute, is invalid. She cannot give a valid warrant of attorney to confess judgment, even for a debt contracted by herself for necessities used by herself and family. The only exception is where the warrant and judgment are for purchase money of real estate conveyed to her, which may be enforced against the land itself, but not against her other lands or goods. Her coverture is an absolute protection against every contract not authorized by legislative enactment. *Hecker vs. Haak*, 88 Pa., 242.

XVI. NEGLECT IN PURCHASING PROPERTY. Where a married woman purchases property, as against her husband's creditors, the burden of proof is on her to show, by clear and satisfactory evidence, that she purchased it on the credit of her

Married Women—Continued.

separate estate, or paid for it with her own separate funds not derived from her husband. *Spering vs. Laughlin*, 113 Pa., 209.

XVII. NEGLIGENCE IN RECORD OF SUIT AGAINST. In actions against married women for necessities, the docket of the justice should set forth the evidence, so that it may appear that the case is within the statute. *Wurzbarger vs. Webb*, 2 Kulp, 35. *Stephens vs. Hadsell*, 3 Kulp, 66.

XVIII. NEGLIGENCE OF CO-OBLIGOR. The non-liability of a married woman is a personal privilege, not to be extended to her husband or a stranger, who unites with her in the contract. While she is not liable on her contracts, one who joins with her in signing a bond or note, whether as principal or surety, is bound. *Leonard vs. Duffin*, 94 Pa., 218.

XIX. NEGLIGENCE ON THE PART OF HUSBAND. Where a married woman is deserted by her husband, she may, by virtue of the act of May 4, 1855, execute a deed for her property without the joinder of her husband, and without having previously obtained a decree declaring her a *feme sole* trader. *Black vs. Tricker*, 59 Pa., 13. *Elsev vs. McDaniel*, 95 Pa., 472.

XX. NEGLIGENCE OF RIGHTS AS A FEME SOLE TRADER. A married woman who has procured by judicial decree all the rights and benefits conferred on a married woman by the act of April 3, 1872, is entitled to receive and enjoy the product of her own labor, and the income and profits of her separate estate. She has a right to employ her husband to manage the business in which she is engaged, and his creditors cannot seize in execution her property produced by his superintendence and labor upon her separate estate. *Baxter vs. Maxwell*, 115 Pa., 469.

XXI. NEGLIGENCE OF CONSIDERATION FOR DEED. A purchaser agreed to pay a wife \$500 if she would execute a deed for land sold by her husband; she executed the deed. Held, that she could recover the money from the purchaser, even on his verbal promise. *McAboy vs. Johns*, 70 Pa., 9.

XXII. NEGLIGENCE TO ACKNOWLEDGE CONTRACT OF SALE. In

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a contract for sale of a wife's land, her name preceded her husband, but there was no acknowledgment. Held, that the wife was not bound. *Colburn vs. Kelly*, 61 Pa., 314.

XXIII. NEGLECT TO ACKNOWLEDGE COVERTURE. An action will not lie against a husband and wife for her false and fraudulent representations to the plaintiff, that she was a widow at the time she executed a bond and mortgage. An action may be maintained against a husband and wife for a pure and simple tort committed by the woman, but not where the basis of the fraud is the contract of the wife. *Keen vs. Hartman*, 48 Pa., 497.

XXIV. NEGLECT TO ACKNOWLEDGE TRANSFER OF CHoses IN ACTION. A wife may assign her choses in action, her husband joining in the act of disposition, without acknowledgement of any kind. Where she cannot restore the consideration, equity will not permit her to repudiate the assignment, on the ground that she had not acknowledged it. *Bond vs. Bunting*, 78 Pa., 210. *Fryer vs. Richell*, 84 Pa., 521. *Dando's Appeal*, 94 Pa., 76.

XXV. NEGLECT IN MECHANICS' LIEN. A mechanics' lien filed against the husband alone as owner and a contractor, but not referring to the wife or making her a party to the record, is not a lien against her estate. What notice would the claim against her husband be to subsequent lien creditors or purchasers from her? The claim should be filed against the wife and appear in the record, in order to charge her. The estate of the wife is protected by express statute from the acts, encumbrance and execution of the husband. *Finley's Appeal*, 67 Pa., 456.

XXVI. NEGLECT TO CLAIM REAL ESTATE. Under the act of April 22, 1856, a married woman must make entry or bring suit to recover lands within thirty years after her right of entry accrues, notwithstanding her coverture. *Hogg vs. Ashman*, 83 Pa., 80.

XXVII. NEGLECT TO SUSTAIN WILL. The act of April 8, 1833, which enacts that the will of a single woman shall be

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revoked by her subsequent marriage, is not repealed by the act of April, 1848, securing the rights of married women. *Fransen's Will*, 26 Pa., 202.

XXVIII. NEGLECT TO INCUR RESPONSIBILITY. A married woman is personally liable for a tort committed by her, unless her husband is present and directs it. The act of June 3, 1887, however, has not abrogated the privilege of a married woman to exemption from arrest and imprisonment for torts committed during her coverture. *Wheeler & Wilson Co. vs. Heil*, 4 Lancaster Review, 215. *Whalen vs. Gabell, Idem*, 409.

XXIX. NEGLECT TO JOIN WITH HUSBAND IN A DEED. A purchaser from a husband takes the risk of the wife joining in the deed to land, or his action against the husband for damages. The vendee cannot compel specific execution by the husband alone, and retain part of the purchase money as indemnity against the wife's contingent claim for dower. *Riesz's Appeal*, 73 Pa., 485. *Burk's Appeal*, 75 Pa., 141.

XXX. NEGLECT TO PAY DEBTS. 1. To make the separate estate of a married woman liable for debt contracted during coverture, all that is required is that the claim shall be for necessities for the maintenance of her family, that they were contracted for by her, or in her name by some one authorized by her, and that her husband was insolvent. *Bear's Estate*, 60 Pa., 430. 2. Where a married woman, whose property is ample, contracts a debt for the board and education of her children, her separate property is not exempt from liability for its payment. *Reed's Estate*, 4 Phila., 375. 3. To bind a married woman's separate estate for medical services rendered herself and family, it must be shown that they were rendered at her request and on her credit. *Sawtelle's Appeal*, 84 Pa., 306.

XXXI. NEGLECT TO PAY FOR NECESSARIES. In an action against husband and wife for necessities furnished on the credit of the wife, the plaintiff, in order to recover judgment, need not prove that the husband has no property or is insolvent or refuses to support the family. *Rigoney vs. Neirnan*, 73 Pa., 330.

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XXXII. NEGLECT TO PAY FOR REPAIRS TO HER SEPARATE ESTATE. A married woman is liable for repairs to her separate estate made at her request, and necessary for its preservation and enjoyment. Her rights of property imply a power to repair. *Lippincott vs. Leeds*, 77 Pa., 420.

XXXIII. NEGLECT TO PROTECT EARNINGS. Where a wife has no separate estate, she can acquire no property with her earnings during coverture. Her earnings belong to her husband, and if she purchases with borrowed money, or on credit, the property belongs to her husband. *Bucher vs. Beam*, 68 Pa., 421.

XXXIV. NEGLECT TO PROTECT SEPARATE PROPERTY. To protect her goods from the husband's creditors, it is incumbent on the wife to establish that their purchase was on the credit of her separate estate. *Seeds vs. Kahler*, 76 Pa., 262.
2. The act of April 11, 1848, was designed to protect a married woman in the enjoyment of her property. While living with her husband, she may not have a possession separate and distinct from his possession. If, however, it be clearly shown that the original property was hers, then all the product and interest become hers as long as they can be followed and identified. The fact that her husband acts as her agent in buying and selling and investing her money, does not, against her consent, transfer her right of property to him. *Holcomb vs. Savings Bank*, 92 Pa., 338. *Troxell vs. Stockberger*, 105 Pa., 405.

XXXV. NEGLECT TO PROVE CLAIM. It is necessary that a wife should prove her right as a creditor of her husband with clearness. On this point there should be no reasonable doubt. *Hause vs. Gilger*, 52 Pa., 412.

XXXVI. NEGLECT TO PROVE TITLE TO SEPARATE PROPERTY. As a general rule, where husband and wife are in the joint possession or occupancy of personal or real estate, the law presumes the property to belong to the husband, unless the wife shows that she acquired it by means not derived from her husband. A married woman cannot buy upon credit, unless she is

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the owner of a separate estate. If she purchases property on borrowed money or credit, it belongs to her husband, as it respects his creditors, and is liable for his debts. *Pier vs. Siegel*, 107 Pa., 508. *Curry vs. Bott*, 53 Pa., 403. *Gaul vs. Saffin*, 44 Pa., 307. *Baringer vs. Stiver*, 49 Pa., 131.

XXXVII. NEGLECT TO RECOGNIZE CONTRACT. In a suit to charge a wife's land with a debt contracted by her husband for improvements, it is a sufficient defence that the improvements were made against her consent. If, however, a married woman be guilty of collusion with her husband, her rights of property will not be protected by a court of equity. *Barto's Appeal*, 55 Pa., 386.

XXXVIII. NEGLECT TO RECOVER DAMAGES. In an action by a married woman in her own right for an injury to her person, she cannot recover damages for the permanent diminution of her earning power, if at the time of the injury she was living with her husband, and not engaged in any independent employment. *Carr vs. Easton*, 7 Lancaster Review, 111. *Carr vs. Easton*, 2 Northampton Co., 105.

Master.

I. NEGLECT IN DEDUCING FACTS. When a master reports facts directly proved by the witnesses, his report has great weight with the court, because of his opportunities of judging of the credibility of witnesses and the effect of their testimony. But when the fact is a deduction merely from other facts reported by him, his conclusion is simply a result of reasoning, of which the court is competent to judge as well as he. *Phillips' Appeal*, 68 Pa., 138.

II. NEGLECT IN FINDINGS. 1. The rule that a master's finding of fact is like the verdict of a jury, and will not be set aside unless clearly against the weight of the evidence, does not apply where the finding is a deduction from undisputed facts, or from uncontradicted and credible evidence. *McConomy vs. Reed*, 152 Pa., 42. 2. To reverse a master's findings without assigning any reason, is simply an act of arbitrary power,

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and practically leaves his findings in full force. The supreme court should have the views of the judge who decided the case upon the facts and the law. *Morgan's Appeal*, 125 Pa., 561.

3. The supreme court will not reverse the finding of a master affirmed by the court, except in case of clear error. *Shaaber's Appeal*, 2 **Monaghan**, 435. *Lobb's Appeal*, 3 **Walker**, 374.

III. NEGLIGENCE IN FINDINGS OF FACT. The findings of a master on questions of fact, approved by the court below, will not be set aside by the supreme court, except for clear error, even where the testimony is conflicting, and the merits appear contrary to the master's conclusions. *Brotherton vs. Reynolds*, 164 Pa., 134. *Kurtz's Appeal*, 100 Pa., 75. *Reid vs. Anderson*, 4 **Montgomery Co.**, 193.

IV. NEGLIGENCE IN REPORT. 1. A master's report should usually consist of five parts. (1) The history of the case, wherein the issues of law and fact should be set out and defined. (2) The findings of fact, given in brief numbered paragraphs, without comment or argument. (3) The findings of law set forth in the same way. (4) The form of decree. (5) Arguments and authorities. *Citizens' Gas Co. vs. Gas Co.*, 7 Pa. County, 277. 2. On appeal to the supreme court from a decree dismissing exceptions to the report of a master, it is not proper practice to assign for error the action of the master in dismissing the original exceptions filed to his report. The action of the court in dismissing exceptions to the report should be assigned for error. *McMullin's Appeal*, 25 W. N., 157. *Kimmel's Appeal*, 2 W. N., 138. 3. The report of a master in chancery should contain a brief statement of the facts found, without the testimony on which they are based, or the reasons for his conclusion. Where the same person acts as examiner and master, the reports should be separately made, but at the same time. *Penn Morocco Co. vs. Walter*, 2 **Montgomery Co.**, 191. 4. The court gives great weight to a master's report, because of his superior opportunities of judging of the credibility of witnesses. His report will not be set aside, unless upon clear evidence of plain mistake. *Spohn vs. Stein*, 1

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Schuylkill Record, 229. *Hully vs. Havens*, 3 Luzerne Register, 185. *Winton vs. Mott*, 4 *Idem*, 71.

V. NEGLECT IN SALE OF REAL ESTATE. A sale of real estate by a master in chancery will be set aside, if, before the confirmation of the same, a higher price is offered, even though no fraud be shown. The bid at such a sale is merely an offer to purchase, subject to the approval of the court. *Fourth Avenue Church vs. Bailee*, 29 Pittsburg Journal, 20.

VI. NEGLECT OF AUTHORITY. A master has no authority to go outside of the bill, and raise and decide questions which were not presented by the pleadings, upon which the parties were never heard by testimony or by counsel, and report a decree entirely foreign to the whole subject of contention before him. *Morio's Appeal*, 4 *Pennypacker*, 398.

VII. NEGLECT TO COMPENSATE. 1. The plaintiff is responsible to the master for his fee, though a decree had been made imposing them on the defendant. The defendant in such case, of course, is primarily liable. *Lowenstein vs. Biernbaum*, 8 W. N., 301. 2 Schuylkill Record, 221. 14 Phila., 199. 2. The fees of a master are primarily chargeable to the party at whose instance the services were rendered. He should certify to the court the proportion of his fee properly chargeable to each party. *Reynolds vs. Baylor*, 3 C. P. Reporter, 54. 3. The party having a master appointed is responsible for the master's fee in the first instance, with the right to recover the same from the parties who were directed to pay the costs. *Wingett's Estate*, 6 Pa. County, 383. 4. A master in chancery is not entitled to a commission, but is to be paid a round sum proportioned to the responsibility and labor incurred. *Wister vs. Foulke*, 6 Phila., 26.

VIII. NEGLECT TO HEAR TESTIMONY. After testimony taken before an examiner and closed, the defendant will not be allowed to reopen his case and present further testimony before the master. *Freeman vs. Stine*, 13 Phila., 28.

IX. NEGLECT TO REMOVE. After a cause has been referred to a master, it cannot be withdrawn without an order of court,

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and such an order will not be made unless on very special occasions, such as the incapacity of the master from illness to attend to the business. *Gibbons' Appeal*, 104 Pa., 587.

Master and Servant.

I. NEGLECT OF A FATHER'S RIGHTS. In an action on the case, *quod servitium amisit*, by a father against the employer of his minor son for placing the boy on a vicious horse, by which act he was thrown and had his leg broken, it is not competent for the master to show his previous treatment of the lad. The opinion of the surgeon as to whether the boy would recover the use of his limb is competent evidence. If an injury be inflicted on a child while living with and in the service of his father, he may maintain trespass; but if at the time he be hired to and in the service of another, trespass on the case is the proper remedy. *Wilt vs. Vickers*, 8 W., 227.

II. NEGLECT IN ASSUMING RISKS. A servant assumes all such risks arising from his employment as he might have known were reasonably incident thereto, and he cannot recover against the master for injuries arising from such patent risks. If, therefore, the machinery which the master furnished him contained obvious defects of which the servant knew, or as a reasonably prudent man might have known, the servant cannot recover against the master for injuries resulting therefrom. *Schall vs. Cole*, 107 Pa., 1.

III. NEGLECT IN RETAINING INCOMPETENT SERVANTS. While one who engages in a general service, in which others are employed, assumes the risks of such service, including those which arise from the negligence of his fellow-employer, still a duty devolves on the employer to use ordinary care in the selection of his employees, and if he neglects to do so, or retains them after he becomes aware of their incompetency, he is answerable for his neglect of duty. *Huntingdon R. R. vs. Decker*, 25 *Pittsburg Journal*, 130. 84 Pa., 423.

IV. NEGLECT IN USING DEFECTIVE MATERIAL. An

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employee whose duty it was to operate cars upon an elevated tramway and to report defects therein, cannot recover damages from his employer for injuries resulting from a defect in the tramway, which he had negligently failed to observe and report, but which he could have discovered by careful inspection. *Cooper vs. Butler*, 103 Pa., 412.

V. NEGLIGENCE OF CARE ON THE PART OF EMPLOYEE. It is a familiar legal principle, that an employee assumes the risk of all dangers in his employment, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. *Cogle vs. McKee*, 2 Northampton Co., 321.

VI. NEGLIGENCE OF CONTRACTOR. One contracting with another person to do work, and not interfering, is not responsible for a negligent act in the performance of the contract, if the act agreed to be done is legal. *Harrison v. Collins*, 86 Pa., 153.

VII. NEGLIGENCE OF FELLOW-SERVANT. 1. Servants are engaged in a common employment, when each by ordinary sagacity might foresee that the employment may expose him to risk by the other's negligence. The plaintiff was employed as draftsman in the defendant's locomotive works; a carpenter, employed by the defendant to do jobbing in the works, had a large pile of rubbish thrown on the public footwalk; the plaintiff, in leaving the building after dark, fell over the dirt and was injured. Held, that the plaintiff and the carpenter were not fellow-servants in the same common employment, so as to relieve the defendant from the carpenter's negligence. The plaintiff having ceased work and left the shop, the relation of master and servant had ended when the injury occurred; he was as any other citizen. *Baird vs. Pettit*, 70 Pa., 477. 20 *Pittsburg Journal*, 46. 2. A party injured by the explosion of a boiler in his employer's factory, is not entitled to recover damages on the ground that the employer placed in charge of the boiler a fireman instead of an engineer, where there was no evidence to connect the acci-

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dent with the alleged incompetency or negligence of the fireman. *Brunner vs. Blaisdell*, 170 Pa., 25. 3. It is well settled, that a servant who is injured by the negligence or misconduct of a fellow-servant, cannot maintain an action against the master for such injury. *Dealey vs. R. R.*, 16 Phila., 123. *Haas vs. Steamship Co.*, 2 W. N., 611. *Middleton vs. Traction Co.*, 21 W. N., 528. *Allegheny Heating Co. vs. Rohan*, 118 Pa., 223. 4. An employee cannot look to his employer for compensation for an injury resulting from the negligence of a co-employee. *Hoffman vs. Clough*, 37 Pittsburgh Journal, 61. 5. Where the evidence warrants the submission to the jury of the question, whether the accident was caused solely by the negligence of a fellow-workman of the plaintiff, it is error for the court to refuse to affirm the point, that if the accident was solely caused by such negligence, the plaintiff cannot recover. If, however, it is admitted that the employer personally directed the work, and called away the workman engaged upon it before he had made it secure, the court should not withdraw the case from the jury. *Fisher vs. Hart*, 149 Pa., 232. 6. A foreman whose authority is special and not general, is a fellow-servant of the employees under him. *Gerwig vs. Folwell*, 13 W. N., 267. 7. In an action to recover for personal injuries from alleged negligence of defendant by a boy of thirteen years, a verdict was properly directed for the defendant, where it was shown that the lad, whose own work was neither difficult nor dangerous, was injured by voluntarily interfering with a machine in the exclusive charge of another employee. Nor would he be entitled to damages for injuries received at a machine at which he was employed, which was not dangerous if used with ordinary care, and concerning which he had received necessary instructions. *Zurn vs. Tetlow*, 134 Pa., 213. *Gillen vs. Rowley*, 134 Pa., 209. 8. A master is responsible for the negligence of his servants in the course of their employment, without regard to their character for skill or care, except in the case of fellow-servants, or of a servant employed by him in some independent work.

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Hays vs. Millar, 77 Pa., 238. 9. Where an employee of a company is injured by the negligence of other employees working under the charge of a foreman in the employ of the same company, there can be no recovery against the common employer, as the accident was the result of the negligence of a fellow-servant. *Ingram vs. Coal Co.*, 148 Pa., 177. *Spancake vs. R. R.*, *Idem*, 184. 10. In determining the rule that a master is not responsible to a servant for an injury caused by a fellow-servant, it is not necessary that the workman causing and the workman sustaining the injury should both be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose. The difference in their grade makes no change in the rule. *Lehigh Valley Coal Co. vs. Jones*, 86 Pa., 432. *Duffy vs. Oliver*, 131 Pa., 203. 11. One who enters upon the service of another, takes on himself all the ordinary risks of the employment; and the negligent acts of fellow-workmen in the general course of the employment are within those ordinary risks. To constitute fellow-servants within the rule, employees need not be at the same time engaged in the same particular work, provided they are in the employment of the same master, engaged in the same common work, and performing services for the same general purpose, and this though one be inferior in grade and subject to the direction of the one whose act caused the injury. *Lewis vs. Seifert*, 116 Pa., 628. *Kinney vs. Corbin*, 132 Pa., 341. *Campbell vs. R. R.*, 17 W. N., 73. *Mensch vs. R. R.*, 150 Pa., 598. 12. Where an employee is temporarily assigned to new and different duties, to resume his former tasks as soon as the new ones are completed, his new associates become fellow-servants for the time being, so that their negligence is that of co-employees. *McGrath vs. Coal Co.*, 3 Delaware Co., 238. 4 Lancaster Review, 281. 4 C. P. Reporter, 77. 13. The risk which a laborer assumes of injury from the neglect of his fellow is when they are co-operating in the same business, so

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that he knows that the employment is one of the incidents of their common service. *Mullan vs. Philadelphia Steamship Co.*, 78 Pa., 25. *Haas vs. Philadelphia Steamship Co.*, 88 Pa., 269.

14. A master is not liable to his servant for the negligence of a fellow-servant while engaged in the same common employment. The master does not warrant the competency of any of his servants to the other. It matters not if they are of unequal grades, if the services of each in his particular labor is directed to the same general end; and although the inferior in grade is subject to the control and directions of the superior whose act caused the injury. *National Tube Works vs. Bedell*, 96 Pa., 178. *Keystone Bridge Co. vs. Newberry*, *Idem*, 246.

15. Employees under the same master, engaged in the same common work for the same general purposes, are fellow-servants. The rule is the same, though the one injured may be inferior in grade and subject to the control and direction of the one inflicting the injury, providing they are both co-operating to effect the same common object. It is only when the master places the entire charge of his business or a distinct branch of it in the hands of an agent or subordinate, exercising no oversight of his own, that the master is held liable for the negligence of such agent or subordinate. *New York & Lake Erie R. R. vs. Bell*, 112 Pa., 400. 3 Lancaster Review, 344. *Duffy vs. Oliver*, 131 Pa., 203. *Mullan vs. Steamship Co.*, 1 W. N., 214.

16. An employee of an iron company, whose business was to unload cars placed in the company's yard by a railroad company, is not a fellow-servant of the trainmen of the railroad company engaged in placing the cars in the yard. If injured by the negligent act of an employee of the railroad company, he has a claim against such company for damages, unless guilty of contributory negligence. *Noll vs. R. R.*, 163 Pa., 504.

17. When several persons are employed as workmen in the same general service, though in different parts of it, and one of them is injured through the carelessness of another, the employer is not responsible, unless he employed unfit persons

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for the service. The master is bound to use ordinary care in providing suitable structure, machinery and tools, and in selecting proper servants, and is liable to other servants, if they are injured by his neglect of duty. *O'Donnell vs. Allegheny Valley R. R.*, 59 Pa., 239. *Ardesco Oil Co. vs. Gilson*, 63 Pa., 147. *Weger vs. Penna. R. R.*, 55 Pa., 460. 18. When a servant assists other operatives of his master in repairing a machine, he is a fellow-servant of those who make the repairs, and if upon their completion he resumes his operation of the machine, and is injured by a defect due to the negligence of those who made the repairs, to which negligence he did not contribute, he cannot recover against the master. But where he has taken no part in making the repairs, the operatives employed by his master to make them cannot be termed fellow-servants, as they are not employed in the same kind of work. It is the duty of one assisting in repairs to see that the machine is safe before resuming its operation. *Reading Iron Works vs. Devine*, 109 Pa., 246. *Penna. & N. Y. Canal Co. vs. Mason*, *Idem*, 299. 19. The rule in regard to the negligence of fellow-servants is this: The master is not liable to a servant for injury caused by the negligence of a fellow servant, provided he is himself free from the imputation of negligence in connection with the injury. *Reese vs. Payne*, 2 Kulp, 361. 12 Luzerne Register, 180. *Anderson vs. Oliver*, 138 Pa., 157. *Kaiser vs. Flaccus*, *Idem*, 335. *Crawford vs. Stewart*, 19 W. N., 48. *Hoffman vs. Clough*, 23 W. N., 399. *Philada. Iron & Steel Co. vs. Davis*, 111 Pa., 597. 20. Although a servant may not be properly qualified for the place he occupies, his employer cannot be charged with the consequences of his negligence, in a suit by a fellow-servant for personal injuries, if it does not appear that the employer knew, or in the exercise of reasonable diligence should have known, that the servant was incompetent to perform the duties of the position assigned him. *Reiser vs. R. R.*, 152 Pa., 38. 21. The courts have uniformly held, that a workman who has been

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injured by the act or negligence of his fellow workman must look for his compensation to him who was the author of the wrong, and not to their common employer. The master does not insure his employees against each other, nor is he bound to supervise and direct every detail of their labor. No employer could bear the burden of legal responsibility for every blunder or neglect on the part of each and all of his employees. *Ross vs. Walker*, 139 Pa., 49. *Ryan vs. R. R.*, 23 Pa., 384.

22. Where several persons are employed to attend to the same general service, and one of them is injured from the carelessness of another, the employer is not liable; nor is he liable even when the carelessness is that of his manager. *Strange vs. McCormick*, 1 Phila., 156. *Ryan vs. R. R.*, 2 Pittsburg Journal, 148. *Strange vs. McCormick*, 5 Clarke, 10.

23. As between master and servant, the duty of the master is to take due care to employ other servants of competent skill and ordinary carefulness; when he has done that, he has done his duty as between himself and his servants. It is well-settled law, that one who is engaged in the service of a common master, and in a common employment, cannot recover against the master for the negligence of a fellow servant, whether he is paid for his service or not. If a stranger joins in the service at request of one of the servants of the master, he is in no better position than a mere volunteer. *Wischam vs. Richards*, 136 Pa., 121.

VIII. NEGLIGENCE OF FIDELITY TO MASTER. An employee who, in consideration of increased wages, agrees not to reveal the secrets of his master's trade, has no right to use the secrets so obtained for his own private use, or reveal them to others. Equity will in such case interfere. *Fralich vs. Despar*, 165 Pa., 24.

IX. NEGLIGENCE OF FOREMAN. When it is sought to hold an employer liable to an employee for the negligent act of a foreman, it must first be considered whether the negligence alleged relates to anything which it was the master's duty to do; if it does, he is liable, for the foreman then is a vice-prin-

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cipal; but if not, and the foreman selected is reasonably competent, the principal is not liable. *Ross vs. Walker*, 139 Pa., 42.

X. NEGLECT OF INDEPENDENT EMPLOYEE. A master is responsible for the acts of his servant done for him and under his supervision and control; but he is not responsible when he gives his contract to a mechanic to do a particular thing, and then leaves the whole work to him, giving him no further instructions. There the mechanic is not the servant of the employer, but is a person acting under an independent employment, under a contract to do a particular thing, and the employer cannot be held responsible for his negligence. *Flynn vs. Arrott Mills Co.*, 19 Phila., 492. *Mullarky vs. Coal Co.*, 2 Luzerne Law Times, 225.

XI. NEGLECT ON THE PART OF MASTER. 1. Where an injury happens to a servant in the course of his employment, the master is responsible if it was caused by his negligence. If the injury is the result of the hazardous nature of the employment, without any fault of the master, he is not liable; but if his negligence was the direct and proximate cause of the injury, he is responsible, whether the business was hazardous or not. Negligence is always a question for the jury, where there is any doubt as to the facts or the inferences to be drawn from them. *Johnson vs. Bruner*, 61 Pa., 58. *Patterson vs. Pittsburg R. R.*, 76 Pa., 389. 2. Where an employee is working under the immediate supervision of his employer, who is spurring him on to work, the employee will not be held to the same measure of care that would be required of him, if he had opportunity for more deliberate care; and where such employee is injured by an accident resulting through the haste urged by the employer, the question of contributory negligence is for the jury, and not for the court. *Lee vs. Woolsey*, 109 Pa., 124. 3. Where the defect in the machinery is of such a character, or occurs at such a time that the master cannot reasonably be expected to have a knowledge of it, it is the duty of the servant to give him notice; neglect of this relieves

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the master from responsibility. In the case of a corporation, such notice should be given to the officer who has the care of the particular department; his negligence is the negligence of the company. Ordinarily, a notice by a fellow-servant, is not sufficient. *Patterson vs. Pittsburg R. R.*, 76 Pa., 390.

XII. NEGLIGENCE ON THE PART OF SERVANT. 1. A person is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, be established between them. When an injury is done by a person exercising an independent employment, the person employing is not responsible to the person injured. *Allen vs. Willard*, 57 Pa., 374. 2. An employer is not responsible for damages for injury to an employee, if the injury is owing to his own negligence, or that of another employee. *Baldwin vs. R. R.*, 2 Lancaster Bar, No. 15. *Johnson vs. R. R.*, 114 Pa., 443. 3. Where goods are entrusted to servants, the owner does not lose his property by a breach of trust in the mandatory. *Davis vs. Bigler*, 62 Pa., 242. 4. In an action for services as a housekeeper, evidence of misconduct of plaintiff and embezzling property of the defendant, may be given in evidence. *Heck vs. Shener*, 4 S. & R., 249. 5. A master is liable for the wilful conduct of his servant, if within the scope of his authority. A boy riding on a car, was wilfully struck by the driver and thereby thrown from the car; the car wheel passed over him. Held, in a suit against the car owners, that they were not liable for the act of the driver in striking the boy, but were liable for negligently driving over him. *Pittsburg R. W. Co. vs. Donahue*, 70 Pa., 119. 6. A master is not liable, either in trespass or case, for the wilful act of his servant, as by driving his master's carriage against another, without his direction or assent. But he is liable to answer for any damage arising to another from the negligence or unskillfulness of his servant, acting in his employ. The action should be case, and not trespass. *R. R. Co. vs. Wilt*, 4 Wh., 147. *Comm. vs. Ohio R. R.*, 1 Grant, 329. *Snodgrass vs. Bradley*, 2 Grant, 43. *Repsher vs. Watson*, 17 Pa., 365.

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Yerger vs. Warren, 31 Pa., 321. 7. If a third person receive from a servant the goods of his master, knowing them to be such, and refuse to restore them, trespass will lie. *Trovillo vs. Tilford*, 6 W., 472. 8. If a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect, but the damage must be done while he is actually employed in his master's service. A servant can justify any act which his master had a right to do. *Woodward vs. Webb*, 65 Pa., 259. 9. Where a servant, using his master's team for his own benefit, without directions from his employer, hitches the horses so negligently as to occasion injury to a passer-by, the master is not liable. *Bard vs. Yohn*, 26 Pa., 482. 10. A workman in a brewery continued working in a room in which the smell of ammonia was plainly noticeable. While standing near an aperture in the wall, a jet of ammonia reached his face, causing him to fall senseless, sustaining injury. Held, that he was guilty of contributory negligence. It is contributory negligence for a workman to clean a machine while in motion, when he knows how to stop it and thus avoid the risk. He cannot claim in an action for damages for the loss of a hand while thus employed, that he was an unskilled workman, and that it was the duty of his employer to instruct him how to clean the machine, and warn him of a danger that was apparent to every person. *Beiltenmiller vs. Brewing Co.*, 22 W. N., 33. *Stoll vs. Hoopes*, *Idem*, 159. 11. Where an employee knows of the defective condition of certain appliances he is using, or being manifest and conspicuous, he is bound to know their condition, and his employer is ignorant of such defect, and by reason of such imperfections in the appliances the employee is injured, he is not entitled to damages from his employer. *Bernisch vs. Roberts*, 143 Pa., 1. 12. The owner of a wagon which is destroyed by collision with a street car is affected by the contributory negligence of his driver. *Carson vs. R. W. Co.*, 147 Pa., 219. 13. If a workman does work insufficiently, he is answerable for all consequences arising therefrom, notwithstanding an

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acceptance by the employer, without objections; for the employer is not to be presumed acquainted with the execution of the work, and the workman must be. *Chambers vs. Crawford*, Addison's Rep., 151. 14. Where an employee occupies a dual position, and, through neglect of duty in one position, an accident occurs to him while serving in the other, by which he is injured, the wrong is his, and he cannot recover for the injury sustained. *Cooper vs. Butler*, 14 W. N., 298. 15. Where employees of a coal company were pushing cars on a trestle which they knew was insecure, and were injured, they were held guilty of contributory negligence. *Carroll vs. Coal Co.*, 22 W. N., 439. 16. To maintain trespass *vi et armis* against the employer, it must appear that the particular injury was done by his command or with his assent. An action against the employer is also properly in case, where the damages claimed by the plaintiff were consequential. *Drew vs. Peer*, 28 *Pittsburg Journal*, 38. *Weiter vs. R. R.*, 29 *Idem*, 347. *Allegheny Valley R. R. vs. McLain*, 91 Pa., 442. 17. The question whether a servant was acting within the scope of his employment when he committed a negligent act is a question of fact for the jury. *Guinney vs. Hand*, 153 Pa., 404. 18. An employee cannot recover from an employer for injuries received in the use of a dangerous appliance, when it was one of his own contrivances, and constructed at his own suggestion, and there is no proof of a defect in the construction or of negligence on the part of the defendant in the care of it. *Hart vs. Coke Co.*, 131 Pa., 125. 19. A dealer in rags and paper employed some laborers to remove some sacks of paper from the upper story of a building where it was stowed. They did so by throwing it from the window, thereby injuring a passer-by. Held, that in doing the work, the laborers were the agents of the defendant, and he was liable for their careless acts. *Hemingway vs. McCullough*, 15 W. N., 328. 20. In an action to recover damages for an injury caused by the alleged neglect of duty of defendant's servant, consisting of the omission of a duty suddenly

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arising, the plaintiff must show that the circumstances were such that the servant had the opportunity to know the facts giving rise to such duty, and a reasonable opportunity to perform it. *Hestonville R. R. vs. Kelley*, 102 Pa., 115. 21. A master is not liable for a wilful trespass committed by a servant in contravention of the express instructions of the master, although the trespass be in the course of a service rendered to the master. Where a passenger is negligently put off a train by the conductor, the company is liable, but not liable where he is maliciously put off. This at least is probably the rule. A master is not liable for the trespasses of his servant, unless the particular wrongful act was ordered or authorized by the master. The acts of a servant bind the master only when done in the course of the business committed to him, or within the scope of an authority specially delegated. *McClung vs. Dearborne*, 24 W. N., 271. 19 Phila., 560. *Ely vs. Waln*, 2 W. N., 248. *McKinsie vs. Philadelphia, Idem*, 526. 22. While not liable for the wilful and independent trespass of his servant, a master is responsible civilly for the manner in which the servant does the work allotted to him, and it is the character of the employment when an act is done, not the private instructions to the servant, by which the master's liability is determined. *McClung vs. Dearborne*, 134 Pa., 396. 7 Lancaster Review, 42. 23. An employer is responsible civilly for injuries caused by the negligence or carelessness of his servants or employees, while engaged in the business for which they have been employed. There cannot be two superiors severally responsible for the same injury or misfeasance. *McCullough vs. Hemingway*, 14 W. N., 14. 24. The rule of *respondeat superior*, though a salutary and well-established one, is ordinarily harsh and severe in its application. When the master has made complete pecuniary satisfaction for the injury done by the reckless act of his servant, the punishment beyond compensation should fall upon the offender. *McFadden vs. Rausch*, 119 Pa., 516. 25. In an action by an employee against his employer, in the absence of

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definite proof of negligence which directly results in injury to the employee, the accident is regarded as one of the hazards of the employment of which the servant takes the risk, and for which there can be no recovery. Any defect which becomes apparent in tools or machinery, it is the duty of the servant to observe and report to his employer. *Mensch vs. R. R.*, 150 Pa., 598. 26. The test of the liability of an employer, for injuries received by an employee in the performance of his duties, is negligence, not danger; and when the evidence discloses no negligence of the employer, from which the injuries resulted to the plaintiff, the trial court should direct a verdict for the defendant. *Moules vs. Canal Co.*, 141 Pa., 632. 27. A master or employer is responsible for the illegal acts of commission or omission, short of wilful wrong, done or suffered by his servant or agent, in the prosecution of the business entrusted to him by his principal, whereby third persons are injured. *Myers vs. Snyder*, Brightly's Rep. 489. 28. Where one voluntarily assumes continuous service, becomes exhausted and falls asleep at his work and thereby suffers injury, there can be no recovery from his employer. *Nattress vs. R. R.*, 150 Pa., 527. 29. An employee assumes the risk of his employment. All machinery is dangerous if not properly used. Where the danger is obvious, a boy of fourteen may know as much of such danger as an adult. If a boy be not allowed to use machinery until he has become accustomed to its use, it would be difficult for him to learn any useful trade. *O'Keefe vs. Thorn*, 24 W. N., 379. *Kennedy vs. R. R.*, *Idem*, 371. 30. Employers are liable for the acts of their servants which are within the scope of their employment, even though the specific act be done at a time and in a manner contrary to the employer's orders. Third persons cannot be expected to be familiar with such orders, and are therefore unaffected by them. *Phila. & Wilmington R. R. vs. Brannen*, 17 W. N., 227. 31. In an action for wages, the defendant may set off damages arising from the servant's negligence while in his employ. *Rafferty vs. Clark*, 18 W. N., 378. 32. Where a mechanic

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had nailed up a hole on the dark floor of a tug boat, which was afterwards reopened without the knowledge or assent of the owners of the boat, and the mechanic walked into it and was injured, held, that he could recover no damages from the owners, as it was equally his business to see that the hole remained closed. *Rick vs. Cramp*, 22 W. N., 79. 33. A master is not criminally liable for the acts of his servant, unless committed by his command or with his special assent. But the law is different in matters not criminal, as where there are injuries occasioned by the neglect or unskillfulness, or the tortious acts of the servant while in the course of his employment by the master. *Sample vs. Styer*, 3 Lancaster Review, 163. 34. Declarations made by workmen while a fire is in progress, to the effect that it was caused by their carelessness, are admissible in evidence in an action by the owner of the property destroyed against the employer of the workmen to recover damages for the loss occasioned by the fire. *Shafer vs. Lacock*, 168 Pa., 497. 35. If a servant, knowing the risks of his employment, voluntarily continues in it, he cannot recover from his master for injuries which he receives thereby, although the risks might have been greatly lessened by the adoption of simple precautions. A workman who cleans machinery in motion, having authority to stop it, but neglecting to do so in order to save time, cannot recover for injuries received. *Stoll vs. Hoopes*, 4 Pa. County, 474. *Handley vs. R. R.*, 5 Luzerne Law Times, N. S., 70. *Reese vs. Clark*, 146 Pa., 465. 36. A boy was employed in a planing mill as an errand boy. He afterwards worked in the mill, and carelessly approached the planing machine and was injured. No damages were awarded. *Whitehead vs. Alrich*, 1 W. N., 508. 37. A master is not responsible for the wrongful act of the servant, not committed in the regular course of his employment, nor commanded by the master, to whom no benefit from it ensued. *Wilson vs. Donaghy*, 7 Phila., 153. *Brunner vs. Telegraph Co.*, 151 Pa., 447. *Scanlon vs. Suter*, 158 Pa., 275. 38. A servant cannot by any act of his impose upon his master a higher liability for

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negligence than the master is under to the servant himself; and one who assists such servant in his duties, at the servant's request only, can have no other remedy against the master for negligence than the servant had. *Wischam vs. Richards*, 130 Pa., 109.

XIII. NEGLIGENCE OF SERVANT TO RETAIN AN INVENTION.

If one employed by another, whilst receiving wages, experiments at the expense of his employer, constructs an invention and permits his employer to use it, without compensation paid or demanded, and then obtains a patent, a license to the employer to use the patent will be presumed. *Slemmer's Appeal*, 58 Pa., 156.

XIV. NEGLIGENCE OF THIRD PARTY. 1. The act of the driver of a vendor of goods in negligently adjusting the chains of a hoist on the outside of the building of the purchaser in the final act of delivery, which caused the goods to fall and injure an employee of the vendee, does not render the purchaser liable in damages. *Fuhrmeister vs. Wilson*, 163 Pa., 310. 2. In an action to recover damages from one person for the negligence of another, who has acted upon his orders upon the principle of *respondeat ouster*, the plaintiff cannot recover, unless it appear that the relation of master and servant in fact existed, whereby the negligent act of the servant was legally imputable to the master. Where the occupant of a store directed the servant of another to throw goods which he had purchased from a window, whereby a passer-by was injured, held, that the person injured had no right of action against the person giving such directions. *McCullough vs. Shoneman*, 105 Pa., 169.

XV. NEGLIGENCE ON THE PART OF A MERE VOLUNTEER. If the plaintiff was a mere volunteer, that is, assisted entirely of his own motion, by his own voluntary proffer of service, the party for whom the work is performed is not liable in damages for injuries received more than he would be if one of his servants was injured. He can impose no greater obligation upon the master, than that to which he was subject in respect

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of a servant in his actual employ. *Wischam vs. Richards*, 136 Pa., 121.

XVI. NEGLIGENCE TO COMPENSATE. 1. If one hires at an agreed price for a certain time, and continues in the same employment at the expiration of the term, without a new agreement, the presumption is that the original rate of compensation was to be continued. But if the nature of the services be greatly changed, compensation can be recovered on a *quantum meruit*. *Gochbauer's Estate*, 4 Montgomery Co., 119. 5 Lancaster Review, 224. 2. A servant cannot recover wages while incapacitated for work owing to injuries resulting from the incidental risks of his employment. *Shaw vs. Deal*, 7 Lancaster Review, 38.

XVII. NEGLIGENCE TO EMPLOY COMPETENT SERVANTS. It is not contributory negligence for a person employed as a blacksmith to continue work with an incompetent helper, if he has been assured by the foreman over him who had authority to engage and discharge blacksmiths, that a suitable person would soon be employed in the place of the helper. *Wust vs. Iron Works*, 149 Pa., 263.

XVIII. NEGLIGENCE TO EXAMINE APPLIANCES. It is not the duty of an employer, after having provided materials ample in quantity and quality for the work his employees are engaged in, to supervise the selection of every piece of material for every purpose, and, if his foreman should make the selection, he does not represent the master therein as vice principal. *Ross vs. Walker*, 139 Pa., 42.

XIX. NEGLIGENCE TO OBEY INSTRUCTIONS. 1. It is the duty of an employee to obey the directions of his employer as to the manner in which his work is to be done, and the materials he should use; and a neglect or refusal to obey such directions is a breach of the contract, which will justify the employer in discharging him from the service. *Matthews vs. Park*, 159 Pa., 579. 2. Faithful service is a condition precedent to the right of a servant to recover wages; misconduct, inconsistent with the relation of master and servant, will justify

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a master in ending the contract of service at any time. But no one is bound to obey an order to do an act contrary to his duty, as the law never justifies a wrong. *Singer vs. McCormick*, 4 W. S., 265. 3. Rules properly posted in a factory for the guidance of employees, become a contract between employer and employee. *Wright vs. Trainer*, 22 *Pittsburg Journal*, 131.

XX. NEGLECT TO PERFORM CONTRACT. Where there is no dispute as to the terms of a contract between master and servant, and as to the conduct of the latter with reference thereto, the question whether he has performed his contract duty is for the court alone. *Elliott vs. Wanamaker*, 20 *Phila.*, 223.

XXI. NEGLECT TO PROTECT SERVANT. 1. The mere fact that an employee is injured while working at a machine raises no presumption of negligence on the part of an employer. The fact that an employee is young, and that a possible injury might arise from unexpected cause, without negligence established, should not be made the basis of liability. *Ash vs. Verlenden*, 154 *Pa.*, 246. 2. Where an accident results from an unforeseen cause not discoverable in advance, with no visible defect in any part of the machinery, nor defect known to the men in charge of it or the employer, the accident is one of the ordinary risks of the employment. *Bradbury vs. Coal Co.*, 157 *Pa.*, 231. 3. An employer is not bound to indemnify an employee for losses resulting from the ordinary risks of the business, nor of the negligence of another employee, unless he has neglected to use ordinary care in the selection of the culpable employee. *Caldwell vs. Brown*, 53 *Pa.*, 453. 4. If a master stands by and sees a servant doing or about to do a negligent act, or failing to exercise ordinary care in the performance of a duty, in consequence of which a fellow-servant may be injured, and does nothing to restrain him, he may fairly be presumed to have assented, and be justly held liable for the consequences, although he may not have given express orders. But, in order to imply assent from his mere presence, and to impute negli-

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gence to him, it must be shown that he knew, or ought to have known, the facts which made the act negligent. *Cannon vs. Mears*, 7 Kulp, 281. 11 Lancaster Review, 215. 7 York Record, 192. *Reese vs. Hershey, Idem*, 83. *Kehler vs. Schwenk*, 151 Pa., 505. *Reese vs. Hershey*, 10 Lancaster Review, 382. *Reinhard vs. Shetzinger*, Montgomery Co. Law Reporter, 1885. 5. An employee in a mill who receives injuries by falling into a concealed well upon the premises, may recover damages from his employer. An employee does not take the risk of concealed danger in the place where he works. He should be warned by his employer. *Clough vs. Hoffman*, 4 Delaware Co., 150. 6. In an action by an employee against an employer to recover for injuries sustained by the fall of a scaffold, on which the plaintiff was working, there was no evidence that the men who erected the scaffold were not competent workmen, nor that the material used was defective or insufficient, nor that the defendant had notice or reason to believe it to be unsafe. Held, that the court should have directed a verdict for the defendant. *Crawford vs. Stewart*, 34 **Pittsburg Journal**, 273. *Congle vs. McKee*, 2 Northampton Co., 318. 7. A master failing to point out latent dangers to a newly appointed servant, is guilty of negligence. *Davis vs. R. R.*, 5 Pa. County, 567. 8. A master does not warrant the safety of his servants, but is under an implied contract to adopt suitable instruments to carry on the business in which they are employed, so that they can perform their duties without exposure to dangers which do not come within the reasonable scope of their employment. A servant will be deemed to have assumed all risks materially and reasonably incident to his employment; hence, he has no right of action against his master for injury done him in such employment. *Green & Coates Street R. W. Co. vs. Bresner*, 97 Pa., 103. *Allison Manufacturing Co. vs. McCormick*, 35 **Pittsburg Journal**, 385. 118 Pa., 519. *Frazier vs. Lloyd*, 23 W. N., 178. *Green & Coates Street R. W. Co. vs. Bresner*, 10 W. N., 379. *Marsden vs. Haigh*, 2 Delaware Co., 73. *Sykes vs. Padue*, 99

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Pa., 465. *Tissue vs. R. R.*, 112 Pa., 91. 3 Lancaster Review, 311. 9. An employee assumes the risk of injuries which are incident to his employment; but when one in charge of a carding machine in a cotton mill is injured by falling into an opening in the floor in a dark adjacent passage-way, of which opening he had no knowledge, and which was not incident to his employment, it is not within the rule. If, however, the hole in the floor had been covered by the defendant, or under his directions, and the cover had been removed without the agency or knowledge of the defendant by a co-employee of the plaintiff, and in consequence of such act of the co-employee, the plaintiff had received the injury, he could not recover against the master. *Hoffman vs. Clough*, 124 Pa., 505. *Pawling vs. Hoskins*, 132 Pa., 617. *Clough vs. Hoffman*, *Idem*, 626. 10. In an action brought by an employee against his employer for damages resulting from an accident, it is error to submit the case to the jury, unless there is clear proof that the dangerous conditions from which the accident resulted had existed for a time long enough to bring notice of them home to the defendant. *Hoffman vs. Clough*, 4 Delaware Co., 205. *Gray vs. Floersheim*, 164 Pa., 508. *Walbert vs. Trexler*, 156 Pa., 112. 11. The plaintiff engaged with the defendant to ride an elephant in a street procession. She charged him with maliciously placing her, on several occasions, on a vicious elephant, which threw her off and injured her. The jury gave her damages for her employer's negligence. *Keyser vs. Forepaugh*, 16 Phila., 127. 12. Where a master knows of defective appliances in his workshop, he should not allow an employee to use them without warning him. *Lee vs. Electric Co.*, 140 Pa., 618. 13. Where an employee was ordered to go upon the girders supporting the roof of a shop, by a foreman in charge, in order to adjust a tackle attached thereto, and was compelled to swing on a brace which the foreman knew was loosely fastened, from which he fell to the floor and sustained injuries, held that the case should have gone to the jury. *Lee vs. Electric Light Co.*, 1 Lackawanna Jurist, 119.

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14. If an employee is, in haste, called upon to execute an order promptly, he is not to be presumed necessarily to recollect a defect in machinery, or a particular danger connected with his employment, so as to avoid it. *Lee vs. Woolsey*, 2 C. P. Reporter, 42. 15. A servant who voluntarily accepts a dangerous employment, assumes all the patent risks incident thereto, and his master is not liable for damages in case of an accident, occurring from such risk, in the course of such dangerous employment. It is not negligence in a master to fail to provide against a patent risk, unless he has been requested so to do by his servant, or has induced his servant to believe that he would do so. *Marsden vs. Haigh*, 14 W. N., 526. 16. Where an employee contracts for the performance of hazardous duties, he assumes the risks incident thereto which are open and obvious, the dangerous character of which he had the opportunity to ascertain. *Keyser vs. Forepaugh*, 13 W. N., 132. *Diehl vs. Iron Co.*, 140 Pa., 487. 17. The mere fact of the occurrence of an injury to a workman, in the course of his employment, raises no presumption of negligence on the part of his employer; and for such an injury, the employee can recover only upon making affirmative proof that the defendant's culpable negligence produced it. In rare instances it has been held, that the employment of young and inexperienced persons to work amidst dangerous machinery imposed upon the master the duty of warning such employees of the latent dangers involved in the work. Where the work and the place are not dangerous, and the materials are those in common use, a master is not compelled to give previous instruction and warning. *Melchert vs. Brewing Co.*, 140 Pa., 448. 27 W. N., 477. *Becker vs. R. R.*, 3 Northampton Co., 402. *Gundelsweiler vs. Chemical Co.*, 161 Pa., 223. *Hahn vs. Smith*, 6 Pa. County, 207. 19 Phila., 476. *McKinzie vs. Phila.*, 8 Pa. County, 293. *Mixter vs. Coal Co.*, 152 Pa., 395. 18. Where an employer is informed that certain machinery on his premises out of sight of his employees is in a dangerous condition, and orders its repair, but before the repairs are made, one of his servants,

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ignorant of the condition of the machinery, in the ordinary course of his employment is injured by its breaking, the question of the defendant's negligence in an action brought against the employer should be submitted to the jury. *Murphy vs. Crossan*, 11 W. N., 9. 19. If the risk is an ordinary one, the employer is not liable, even if the employee did use ordinary care. In all cases, the risk of injury is one of the hazards which the employee assumes when he engages in the service to which it is incident. *Northern Central R. R. vs. Husson*, 3 York Record, 137. 20. One who is hired to perform a special work, but is set to perform a different and more dangerous task, without being first informed of its danger or having an opportunity to notice it, may recover damages for an injury sustained. Where the employment is general, it is the duty of the employee to know the danger. *Nuttall vs. Delaware Engine Works*, 3 Delaware Co., 181. 4 Lancaster Review, 161. 21. A servant or employee assumes the risk of all dangers in his employment, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. The master's liability arises, where he subjects his servant to dangers he should provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty. Where an employer has furnished his employees with tools, which though not the best possible to be obtained, may by ordinary care be used without danger, he is not responsible for accidents. *Pittsburg R. R. vs. Sentmeyer*, 92 Pa., 276. *Payne vs. Reese*, 100 Pa., 301. 11 Luzerne Register, 197. 3 York Record, 119. 2 Kulp, 155. 22. An explosion in a quarry, whereby a servant is injured, raises no presumption of negligence on the part of a master. There can be no inference of negligence from the mere fact of the injury, except in cases against common carriers. *Pizzirussi vs. Dyer*, 7 Montgomery Co., 195. 23. An employer, while moving machinery from

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an old building to a new one and making alterations in the new building, is not held to the same degree of strictness in the care of his employees during the alterations, as is required of him after such alterations are completed. *Rooney vs. Carson*, 161 Pa., 26. 24. It is the duty of an employer to provide his laborers with suitable places to work, with suitable tools and machinery to use in doing their work, and with reasonably competent fellow-laborers with whom to work ; and, also, to instruct the young and inexperienced employee in the use of tools and machinery, and as to the dangers peculiar thereto. A vice-principal, to whom an employer delegates the performance of these duties, represents the employer, who is bound by his acts. In all other acts, a foreman acts as a workman, and not as a vice-principal. *Ross vs. Walker*, 139 Pa., 42. 25. A master must provide and maintain reasonably suitable instruments and means to carry on his business so that his servant may perform his duties with relative safety, and without exposure to dangers not reasonably incident to his employment. A servant who has had full opportunity to become acquainted with the risk of his situation, and has made no complaint to his employer as to a danger to which he is exposed, but continues to work voluntarily, must be held to have assumed for himself the risk of the injury to the danger of which he is exposed. *Rummell vs. Dilworth*, 111 Pa., 343. 131 Pa., 509. *Wanamaker vs. Burke*, 111 Pa., 423. *Brossman vs. R. R.*, 113 Pa., 490. *Campbell vs. R. R.*, 33 *Pittsburg Journal*, 359. 17 W. N., 73. *Schall vs. Cole*, 107 Pa., 1. 26. An employer is only bound to furnish those in his employ with ordinary machinery, such as with reasonable care may be used with safety. He is not bound to insure against accidents. An employee, who is injured in whole or in part as the result of his own negligence, cannot recover from his employer. *Shaffer vs. Haish*, 110 Pa., 575. 27. A farm laborer, whose duties included the grooming of the farm horses, cannot recover from his employer for personal injuries caused by the kick of one of the horses, which he knew was vicious ; no knowledge of its viciousness on the part

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of the employer being shown. Nor can he recover wages for the period he was laid up. *Shaw vs. Deal*, 20 Phila., 419. 5 Montgomery Co., 202. 25 W. N., 38. 28. An employee assumes risks which are patent, and latent risks of which he is informed. The master owes to the servant the duty of providing a reasonably safe place to work in, and reasonably safe appliances with which to do the work, and the delegation of this duty to an agent or independent contractor will not relieve the master from responsibility for an injury to the servant resulting from its neglect. And, if there is any default in the selection of the other servants, or in continuing them in their places after they have proved incompetent, the master is answerable for an injury to another servant, which is the consequence of such default. *Trainor vs. R. R.*, 137 Pa., 159. 29. In an action against an employer to recover damages for the death of an employee, who fell into a hole that suddenly appeared on the top of a flue, and was burned to death, it was shown, that the flue was strongly built only six months before and had been inspected three months before, and was apparently safe, and no proof existed that defendant had omitted any safeguard against accidents, it was held that there was not sufficient evidence of defendant's negligence to submit the case to the jury. *Tunney vs. Carnegie*, 146 Pa., 618. 30. In an action to recover damages for personal injury sustained by inhaling fumes of nitric acid, the plaintiff, though a common laborer of the defendant, engaged in outside work, was ordered by defendant's superintendent to do some work in his chemical works. He obeyed the order, on the assertion of the superintendent that the fumes of the acid would not hurt him, and with no previous knowledge of the danger from their inhalation. He was taken seriously ill, and brought this suit against the chemical company. Held, that it was proper to submit the question of defendant's negligence to a jury. *Wagner vs. Chemical Co.*, 147 Pa., 475. 31. While one who engages to perform a hazardous work, will ordinarily be held to have accepted the risks incident to it, yet, if the master, by

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any negligent act not incident to the work, cause his servant to receive a personal injury, he is responsible therefor, unless the act of the servant contributed thereto. *Woodward vs. Shumpp*, 120 Pa., 458. 32. Where an employer ordered a servant to do certain work, and prematurely let the brake off from a car, which as a result ran over and injured the employee, held, that it was for the jury to decide whether the employer was guilty of negligence. *Woodward vs. Shumpp*, 36 *Pittsburg Journal*, 78.

XXII. NEGLECT TO PROTECT YOUTHFUL EMPLOYEE. 1. It is not negligence in an employer to place a boy of nearly fourteen years of age of fair intelligence and of unusual size and strength at work in a place where machinery is used in labor adapted to his age. *Brewer vs. Scott*, 4 *Pennypacker*, 482. 2. In an action by a boy of fourteen against his employer to recover damages for personal injuries, it was held, that with six months' experience in a machine shop, the boy was capable of judging of the danger of ascending a ladder to place a belt upon a pulley, which he had been warned not to touch. *Greenway vs. Conroy*, 160 Pa., 185. 3. An employee assumes the risk of all dangers in his employment, however they may arise, against which he may protect himself by the exercise of ordinary observation and care, and the employer is not responsible for those injuries to which the employee voluntarily subjects himself. This rule applies equally to infants under fourteen years of age, where the employer has not been guilty of negligence. *Kaufhold vs. Arnold*, 163 Pa., 269, 279. 4. In an action by a girl of thirteen against her employer for damages for personal injuries, the question of defendant's negligence and plaintiff's contributory negligence are for the jury, where there is evidence that the defendant ordered the plaintiff to do dangerous work to which she was unaccustomed, without giving her any instructions how to do it, resulting in her injury. *Kilheary vs. Thackery*, 165 Pa., 584. 5. In an action by a father to recover damages for the death of a minor son, the case should be submitted to a jury, where there is evidence that the

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boy was killed while working on a dangerously narrow platform, and that the father had complained to the superintendent of the danger, who promised to substitute another workman in the boy's place. *Madara vs. Iron Co.*, 160 Pa., 109. 6. Where a boy of thirteen, without fault on his part, is suddenly placed in a position of peril, he cannot be held to the duty of quickly deciding, and acting upon the wisest course to escape threatened danger. It is the duty of the employer to see that the lad received such instructions as would inform him of the dangers which surrounded him, and would enable him as far as practicable to avoid them. *Neilson vs. Coal Co.*, 168 Pa., 256. 7. While an employee, as a general rule, must be held to have assumed, when he entered upon an employment, the risks which are incident to it, yet he has a right to expect that the dangers will be pointed out to him, and that he will be instructed in those things he should know in order to provide for his own safety. In case of young persons employed, it is the duty of their employers to note their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. *Rummell vs. Dilworth*, 131 Pa., 509. 25 W. N., 409. *Bellows vs. R. R.*, 157 Pa., 57. *Lebbering vs. Stouthers*, *Idem*, 312. *Fisher vs. Canal Co.*, 153 Pa., 379. *Tagg vs. McGeorge*, 155 Pa., 368.

XXIII. NEGLIGENCE TO PROVIDE SUITABLE MACHINERY.

1. Where the plaintiff's statement set forth in a general way negligence in providing defective machinery, and operating the same unskillfully, which was the cause of injury to the plaintiff, and the statement fails to show how and where the plaintiff was injured, and the extent of such injury, the statement is insufficient. *Anderson vs. Haig*, 12 Pa. County, 450. *Mullan vs. Phila. Steamship Co.*, 78 Pa., 25. 2. Employers owe to their servants and workmen the exercise of reasonable care and proper diligence in providing them with safe machinery and suitable tools, and employing competent superintendents and fellow-workmen. If one employs a reputable machinist

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to construct a steam engine, and it blows up from bad materials or unskillful work, the employer is not responsible for injury to his own servant or to a third person. The rule is different if the machine is made according to the employer's own plan, or if he interferes and gives directions as to its manner of construction. *Ardesco Oil Co. vs. Gilson*, 63 Pa., 146.

3. In an action to recover damages for injuries received by an employee from the breaking of machinery, the fact that the accident occurred and that it was possible to prevent it, is not the legal test of liability for negligence on the part of the employer. The rule of duty on the part of the employer is, not that he must provide machinery such as will either insure the employee against injury or be of the very best and newest device obtainable, but such as is ordinarily in use, and reasonably safe, for the work to be done. The test of negligence, in respect of machinery, is the ordinary usage of the business. *Augerstein vs. Jones*, 139 Pa., 183. 27 W. N., 169. *Ford vs. Anderson*, *Idem*, 261. *Linkitus vs. Butler Colliery*, 7 Kulp, 72.

4. An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operations, in order to save himself from responsibility for accident resulting from its use. If the machinery be of ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required of the employer. Nor is a master liable for latent defects in tools or machinery of which he has no knowledge. *McAvoy vs. Woolen Co.*, 27 W. N., 450. 140 Pa., 1. 5. The duty which a master owes to a servant is to provide him with safe tools and machinery. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. It is not negligence in the master, if the tool or machine breaks, whether from an internal original fault, not apparent when it was first provided, or from an external apparent one produced by time and use, not brought to the master's knowledge. A different rule, however, prevails where the tool or machinery is perishable. In such case, it is the

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master's duty to renew it at proper intervals. *Baker vs. R. R.*, 95 Pa., 211. 6. An employee who continues to use a machine which he knows to be dangerous, takes upon himself the risk of injury therefrom ; but this rule is inapplicable, if the risk do not threaten immediate danger, and the master has promised to remedy the defect. *Broomfield vs. Hughes*, 128 Pa., 194. 7. An employer is bound to provide his employees with suitable machinery and implements for their use, keep them in reasonable order, and take the usual and necessary precaution against accident. It is not a failure of duty not to warn a skilled mechanic as to the possibility of accident from the use of a machine. *Delaware River Engine Works vs. Nuttall*, 36 *Pittsburg Journal*, 7. 8. There is liability to accident in all employments, but the law does not require an employer to protect his employees against the possibility of an accident. He is bound to provide suitable machinery and implements for their use, see that they are in reasonable order, and that the usual precautions against accident are taken. *Delaware River Engine Works vs. Nuttall*, 3 Delaware County, 401. 9. In the absence of proof to the contrary, it is a presumption of law, that machinery furnished by master is suitable for the purpose for which it is used, and with reasonable care could be operated without danger. *Grimont vs. Hartman*, 17 W. N., 252. 10. Evidence that a machine is defective, when it is simply the inference of the witness from certain peculiarities of its operation, is receivable only from an expert. *Hawthorne vs. Salt Co.*, 20 Phila., 228. 10 Pa. County, 77. 11. It is the duty of every employer to provide his laborers with safe machinery and suitable tools and appliances, but this rule has its reasonable limitations. It is impossible that a railroad company should know the condition of every tool or appliance used, and when these are placed in good condition, or with no patent defect, in the hands of its employees, the company has fulfilled its obligation, and ought not to be held liable for an injury resulting in their breaking or failure, unless the company be shown guilty of negligence. *Kinney vs. Cor-*

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bin, 132 Pa., 343. 12. An employer is not bound to supply his employees with appliances not in general use. He has discharged his duty, when he furnishes them with such tools and appliances as with ordinary and reasonable care may be used without danger. *Lehigh Coal Co. vs. Hayes*, 128 Pa., 294. 13. It is not error for the court to refuse to charge that the employer does his duty, when he provides his employees in such manner as "he fairly and reasonably deems prudent and safe," and to substitute the words "in such manner as is fairly and reasonably prudent and safe." *McCombs vs. R. R.*, 130 Pa., 182. 14. In order that an employer may be held liable to an employee for negligence arising from some defect in the machinery or appliances used by the employee at the time of the accident, it is not enough to show that the defect existed at the time. It must also appear, that the master had an opportunity of previous knowledge, or that the facts were such that he ought to have known of the defect. *Mixer vs. Coal Co.*, 152 Pa., 395. 15. The only duty of an employer as to risks from defective machinery, is to see that it is sound when it is placed in the hands of the employees. *Mullarky vs. Coal Co.*, 2 Luzerne Law Times, 225. 16. The fact that a boiler had a crack in it through which the water leaked, and of which the superintendent of the company owning the boiler had notice, does not absolutely fix the liability for injuries resulting from explosion of the boiler caused by a lack of water upon the company, when the lack of sufficient water was due to the negligence of the foreman. *Mullen vs. Filer*, 1 Lackawanna Jurist, 33. 17. The duty of a party to exercise ordinary care to provide suitable machinery to be operated by his employees, does not require the adoption of the best machinery which can be procured, or that which combines the latest devices and improvements, but such only as is reasonably safe and in common use. Where an employee knows that certain machinery is defective and dangerous, and continues to use it without informing his employer of such defect and asking for its repair, he volun-

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tarily accepts the risk, and has no claim for damages for an injury caused from it. *Phila. & Reading R. R. vs. Hughes*, 119 Pa., 301. *Iron Ship Works vs. Nuttall, Idem*, 149. *N. Y. & Lake Erie R. R. vs. Lyons, Idem*, 324. *Bashdoll vs. R. R.*, 21 W. N., 281. *Donaghy vs. R. R., Idem*, 154. 18. Where an injury happens to a servant in the use of machinery in the usual course of his employment, of the nature of which he is as much aware as his master, the servant cannot recover. This is true, though the master has in use a machine less safe than some others in general use, or that there was another and safer mode of doing the business. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that is required of the employer. *Drew vs. Coal Co.*, 3 Kulp, 207. 14 *Luzerne Register*, 1. 19. A master is bound to use care to adopt and maintain suitable instruments and means to carry on the business in which his servants are employed, but is not required to furnish the newest or best form of instruments. A servant assumes the patent risks naturally and reasonably incident to his employment. *Phila. & Wilmington R. R. vs. Keenan*, 103 Pa., 124. *Faber vs. Manufacturing Co.*, 126 Pa., 389. 20. When, in an action by an employee to recover damages for injuries resulting from specified defects in an instrument furnished by his employer for use, yet if there be no evidence that the injury was proximately the result of the defects complained of, it is error to submit the case to the jury. *Pittston Coal Co., vs. McNulty*, 120 Pa., 414. 21. The duty of an employer to furnish his employee with suitable appliances arises by implication of law out of the relations of the parties. It is imposed by law, not created by contract; hence a *capias ad satisfaciendum* may issue upon a judgment recovered by an employee against his employer for personal injuries caused by the negligence of the employer. *Romberger vs. Henry*, 167 Pa., 314. 22. Where a parent permits his minor son to engage in a dangerous employment, in a place where insuffi-

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cient and unsuitable appliances are used, and allows him to remain in it without objection, he is guilty of contributory negligence, and is not entitled to recover damages for an injury to the lad while engaged in such employment. *Schwenk vs. Kehler*, 122 Pa., 67. 23. It is not evidence of negligence, that an employer has not made use of an alleged improvement which would have prevented an accident. In relation to one class of mechanical apparatus, spark arresters for engines and locomotives, there are decisions which exact the adoption of every valuable improvement. But it would be unreasonable to exact the same degree of vigilance in all other cases, and to require the trial of every new appliance to prevent danger and loss. *Stack vs. Patterson*, 6 Phila., 225. 24. The law does not impose upon an employer the duty to see that the machinery by which others do his work is properly constructed. Everyone using it is supposed to know its character. He must either decline the appointment, or take the risk thereof. *Strange vs. McCormick*, 1 Phila., 156. 5 Clark, 10. *Cole vs. Wehn*, 3 W. N., 408. 25. A master is not bound to use the newest and best appliances. He must furnish those of ordinary character and reasonable safety. He is not necessarily liable, because a particular accident might have been prevented by some special device or precaution not in common use. *Titus vs. Bradford*, 26 W. N., 472. *Northern Central R. R. vs. Hurson*, 3 York Record, 139. 26. An employer performs his duty, when he furnishes appliances of ordinary character and reasonable safety, and the former is the test of the latter. Reasonably safe means safe according to the usages, habits and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger but of negligence. The standard of due care is the conduct of the average prudent man. Juries cannot set up a standard dictating in effect the customs or control the business of the community. *Titus vs. R. R.*, 136 Pa., 626. *Reese vs. Hershey*, 163 Pa., 253. 27. A master is bound to furnish only such machinery and appliances as are

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of the character ordinarily used and of reasonable safety, and the former is the conclusive test of the latter. The test of liability of an employer to an employee for injury received in the course of the employment is not danger, but negligence. *Kehler vs. Schwenk*, 144 Pa., 357.

XXIV. NEGLECT TO REPAIR MACHINERY. 1. An employer who has had opportunity to discover a defective appliance, and does not repair it within a reasonable time, is liable in damages to an employee who is injured by reason of its defects while in the performance of his duties. *Bennett vs. Glass Co.*, 158 Pa., 120. *Bannon vs. Lutz, Idem*, 166. 2. Where an injury results to an employee from defect in machinery, it is not error for the court to refuse to charge that unless the defect in the machinery was known to the defendant company, the plaintiff could not recover. The proposition was too broad. If they should have known it, and by the exercise of ordinary care they would have known it, it was sufficient. *Bier vs. Manufacturing Co.*, 130 Pa., 446. 3. The plaintiff was employed by the defendant in work about the engine and boiler of his establishment. There was evidence that the boiler was defective and dangerous, and that the defendant was aware of this. A tube of the boiler burst, and the plaintiff was badly scalded. Held, that it was for the jury to decide, whether the defendant had been guilty of negligence in furnishing or maintaining defective machinery. *Glossen vs. Gehman*, 147 Pa., 619. 4. Where an employer is informed that certain machinery on his premises, out of sight of his workmen, is in a dangerous condition, and orders its renewal, but before it is done an injury occurs from the old machinery to a workman ignorant of its defects, the question of the employer's negligence must be left to the jury. *Murphy vs. Crossan*, 98 Pa., 495.

XXV. NEGLECT TO RETAIN SERVANT. 1. When a servant is engaged for a specific period of time, serious illness on his part, although justifying his ceasing from work and enabling him to recover for the services actually rendered, nevertheless absolves the master from the contract, so that he is

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not obliged to receive the servant back in his employ. It releases both from their mutual obligations, but in such cases if the master has sustained any damage by reason of the servant's failure to perform his contract, he is entitled to deduct it from the wages earned. *Allentown Iron Co., vs. McLaughlin*, 24 W. N., 343. 2. A master may discharge his servant, where there is nothing in the contract of hiring to restrain him. Whether there is good cause for such action is immaterial, and the question of malice has nothing to do with the case. He is not liable in damages for the discharge, but is for any unjust imputations cast upon the character of the servant. *Buzzard vs. Guest*, 7 Montgomery Co., 197. *Henry vs. R. R.*, 139 Pa., 297. 3. In every contract of hiring, it is implied that the servant is competent and will faithfully discharge his duties. Otherwise, he may be discharged before the end of his term, and the master is not bound to give his reasons for dismissal at that time, if a good cause existed. Disobedience and insisting on doing things in his own way, is a good cause for dismissal, if the orders of the master were reasonable. *Cassidy vs. Janauschek*, 17 Phila., 325. 4. When a person is employed as an agent or salesman, for no definite time, the law does not imply a hiring by the year, but at the will of both parties, and the principal has the right to terminate it at any time, and to discharge the agent from his service without notice. *Coffin vs. Landis*, 46 Pa., 426. *Kirk vs. Hartman*, 63 Pa., 105. 5. The question as to whether there was a legal justification for the discharge of a servant, is a question of law for the court, and not for the jury. Where a man is employed as assistant buyer, the employer may employ other buyers, and define the particular province of each, and if the person first employed refuses to perform such additional employment assigned to him, his employer may discharge him. *Elliott vs. Wanamaker*, 9 Pa. County, 497. 6. Where a servant has been discharged before the expiration of his term of employment without sufficient excuse, he is *prima facie* entitled to recover to the extent of his wages for the whole term. The servant is bound, how-

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ever, to use reasonable efforts to obtain employment elsewhere, but the burden of showing that by such efforts he might have found such employment is on the defendant. *Emery vs. Steckel*, 126 Pa., 171. *Chandler vs. Morgan*, 68 Pa., 168. *Smiley vs. Broomfield*, 21 W. N., 528. 7. It is as much within the power of a corporation, as of an individual, to bind itself by a contract for personal services for a fixed period of time, with liability for the discharge of the employee without sufficient cause before the period of employment has expired. *Hand vs. Coal Co.*, 143 Pa., 408. 8. The motive of the master in discharging a servant is an immaterial issue. The sole question is whether a legal cause existed at the time of the dismissal. An adequate cause of the dismissal existing and known to the employer need not be specially assigned at the time. *Kane vs. Moore*, 9 Montgomery Co., 165. 9. An employee for a determinate period, if improperly dismissed before the term of service has expired, is *prima facie* entitled to recover the stipulated compensation for the whole time. If the plaintiff was engaged in other profitable employment during the term, or such employment was offered to him and refused, the defendant may show it, in mitigation of damages. *King vs. Steiren*, 44 Pa., 99. 10. One who is discharged from employment without cause, cannot recover in the common courts *in assumpsit* for the time he was prevented from working. The declaration should set out the special agreement, with an averment of the plaintiff's readiness to perform. *McGuicken vs. Timoney*, 2 Chester Co., 249. 11. One who is discharged from an employment before the expiration of the contract time, is bound to seek other employment, and the money so earned must be deducted from the gross damages claimed for the breach. *Marr vs. Cook*, 1 Delaware Co., 157. 12. The fact that a business proves unprofitable, is sufficient ground for the discharge of an employee before the expiration of his contract, when it appears that the contract was made upon the representations of the employee that it would be profitable. *Marr vs. Cook*, 1 Delaware Co., 237. 13. An employer may not, without cause,

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discharge an employee who has contracted to serve for a specified term ; but where there is any misconduct inconsistent with the relation of master and servant, the master has an undoubted right at any time to put an end to the contract, and what is sufficient reason for dismissal is a question of law for the court. A trifling injury to the employer's property, the result of accident or a single act of negligence on the part of the employee, might not warrant the latter's dismissal ; but, for a wilful disobedience of a lawful order, the employer has a right to dismiss. *Matthews vs. Park*, 146 Pa., 384. 14. A master is justified in discharging a servant for drunkenness while off duty, if his drunkenness incapacitated him from faithfully performing his work while on duty. A single instance of reckless driving or using a team for other people's work, is sufficient to justify a master in discharging his driver, if the master has been thereby injured. *Ulrich vs. Hoover*, 156 Pa., 414. 15. Where a master dismisses a servant, alleging as a ground for dismissal the use of abusive and profane language, and the servant denies that he used such language, the question of the right of the master to dismiss him is for the jury. The limit of recovery is not confined merely to the amount due at the time the writ was issued, but full damages may be recovered for the breach of contract. *Wilke vs. Harrison*, 166 Pa., 202. 16. In a hiring for personal service, where a party is dismissed before the end of his term, he is not obliged to seek employment nor perform services offered him of a different nature. *Wolf vs. Studebaker*, 65 Pa., 460. 17. A contract of hiring of a servant is dissolved by the death of master or servant. It was held in England that if the contract of hiring is made with a partnership to serve the firm for a certain time, the contract is dissolved by the death of any one of the partners. Even if the contract of hiring by decedent was for a year, yet the act of God will excuse its performance. *Womrath's Estate*, 23 W. N., 434. 19 Phila., 123. 18. A contract of hiring of a servant is dissolved by the death of the master. The most he is

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entitled to in such case is wages to the first of the succeeding month. *Womrath's Estate*, 6 Pa. County, 262.

Mechanic.

I. NEGLECT IN HIS WORK. On a trial in an action for work done in furnishing gas fittings for the defendant's house, a witness for the defendant having testified to the work being badly done, cannot be asked whether the mechanic has not done defective work of a similar kind elsewhere. *Smith vs. Dreer*, 3 Wh., 155.

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I. NEGLECT AS TO MARRIED WOMAN'S PROPERTY. A mechanic's claim against a husband and wife for work done on the wife's separate property, is defective in not showing that the property was the wife's, and the work done by her authority. The claim cannot be amended after the statutory period for filing the claim. *Dearie vs. Martin*, 78 Pa., 55. *Lloyd vs. Hibbs*, 81 Pa., 308. *Fuller vs. Enright*, 37 Pittsburg Journal, 431. 2. A mechanic's lien filed against a married woman's separate estate for work done and materials furnished in and about a dwelling erected for her is valid. The claim must set forth, that the work was necessary for the improvement of her separate estate. *Germania Savings Bank's Appeal*, 95 Pa., 329. *Einstein vs. Jamison*, *Idem*, 403. 3. In order to charge the property of a married woman, the fact of coverture should be set forth, and the record must show that the debt sought to be charged upon her separate estate is within the spirit and meaning of the statute, and was for work and materials done or furnished her separate estate. *Schriffer vs. Saum*, 81 Pa., 388. 4. It is essential to the validity of a mechanic's lien against the separate estate of a married woman, that the claim should set forth that the work was done and the materials furnished with her authority and consent. Her husband cannot bind her separate estate, even for necessary repairs, unless by her authority. All the facts necessary to

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create a valid lien must be set forth in the claim. *Steinman vs. Henderson*, 94 Pa., 313.

II. NEGLECT BY JOINING DISTINCT CLAIMS. Under the act of 1836, separate and distinct claims for work done and materials furnished may be properly joined in one mechanic's lien. It is not necessary that the lien should show that the materials were used for the erection of the building. *James vs. Keller*, 5 York Record, 211.

III. NEGLECT IN AMENDING. 1. Amendments to mechanic's liens, introducing new parties, cannot be made after the statutory limit of six months has elapsed. *Beetem vs. Treibler*, 26 Pa. County, 605. *O'Neill vs. Hurst*, 23 Pittsburg Journal, 91. 2. Any amendment to a mechanic's lien, conducive to justice and a fair trial on the merits, and which does not introduce the name of a person as reputed owner after the statutory period for filing a lien against such person has expired, is authorized and required by the act of June 11, 1879. *Bethel vs. Fuller*, 7 Montgomery Co., 61. *Horton vs. Watson*, 8 Pa. County, 143. 3. The act of June 11, 1879, does not authorize the material amendment of mechanic's claims after the expiration of six months. An amendment after that period is only permitted in cases where the claim contains all the requirements of the law and in due form, and where intervening rights will not be affected. *Dennis vs. Williams*, 5 Delaware Co., 81. 4. Under the act of June 11, 1869, a mechanic's lien can be amended, so as to specify more particularly the material and labor upon which the lien is based. *Flanagan vs. Weitzel*, 3 C. P. Reporter, 168. 5. The substitution of a different person and lot of land in a mechanic's lien is not properly an amendment; yet it may be allowed where it does not interfere with intervening rights. *Graham vs. Smith*, 21 W. N., 574. 6. A mechanic's lien may be amended under the act of June 11, 1879, after the statutory limit of six months for filing the same, by adding the name of the contractor, where the bill of particulars filed with the lien shows that he was the contractor. *Hoffa vs. Building Ass'n*, 3 Pa. Dist., 566.

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7. After the statutory period for filing a mechanic's lien has expired, an amendment introducing the name of a contractor will not be allowed, if the owner objects, even if the contractor consents. *Murta vs. Stephenson*, 9 Montgomery Co., 17.

8. The court has no power to allow the amendment of a lien, materially changing the character of the claim, after the expiration of the six months allowed for filing it. *Pusey vs. Sharpless*, 3 Delaware Co., 361. 9. A mechanic's lien may be amended by changing the dates, saving intervening rights, even after the period of six months from the filing. *Schaeffer vs. Rohnbach*, 5 C.P. Reporter, 250.

IV. NEGLECT IN AMOUNT. A mechanics' lien for repairs must amount to more than fifty dollars against each house. *Steffy vs. Frost*, 24 Pittsburg Journal, 127.

V. NEGLECT IN APPORTIONED CLAIM. 1. In a joint apportioned claim, under the mechanic's lien act, filed against a number of buildings, the claim must set forth that the buildings are contiguous. *Palmer vs. Bullock*, 3 York Record, 12. 2. Where ten blocks of houses built under the same contract are not divided by a public street or alley, but by a private way, the right to which belongs to both blocks, there is not such a severance as will prevent an apportionment of a mechanic's claim amongst the several houses. *Fitzpatrick vs. Allen*, 80 Pa., 292. 3. It is not competent to make an apportioned claim against buildings in different blocks a good claim by filing such a claim separately against each building. The bill of particulars is an integral part of the claim, and must be read with it. *Schultz vs. Asay*, 2 Pennypacker, 411. 4. Apportioned claims are only allowable against buildings adjoining each other, and not separated by streets. *Schultz vs. Asay*, 10 W. N., 33. 11 W. N., 194. *Miller vs. Allen*, 3 W. N., 374. *Lucas vs. Hunter*, 153 Pa., 293.

VI. NEGLECT IN AVERMENTS. 1. Under the original mechanic's lien law, it was necessary to set forth when the work was done and the materials furnished with certainty, giving the nature and value of each. But by the act of March

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24, 1849, it was provided, that where the amount and value of the materials could not be ascertained otherwise than by measurement, or the work was done under a contract for a stipulated sum, it would suffice to state when the work was commenced and when finished, and of the aggregate price. *Blair vs. Singerly*, 7 Phila., 230. 2. A claim which does not show that the work was done or materials furnished in the erection of the building is fatally defective. *Bonsall vs. Andrews*, 1 Delaware Co., 291. *Ramsey vs. Greenwood, Idem*, 308. 3. A claim for "labor performed or furnished" is not sufficiently described to sustain a mechanic's lien. The dates, items and amounts for each item should be stated specifically and separately. *Graham vs. Machine Co.*, 1 Chester Co., 73. *Jester vs. Church, Idem*, 165. 4. In a statement filed by a mechanic or material man, under the mechanic's lien law, there must be an accurate description of the labor performed or the materials furnished. The amount of the material, as well as the kind, and price therefor, must be embraced in the claim filed to constitute a valid lien. *Heron vs. Robinson*, 2 Parsons, 252. 5. It is not necessary that a mechanic's claim should state in words that the work was done and the materials used in the construction of the building. Separate and distinct items may be joined in the same claim. *James vs. Keller*, 2 Pa. Dist., 165. 6. The question of the sufficiency of a claim on a mechanic's lien can be raised on a demurrer, or by motion to strike off the lien, but it must be done before plea and affidavit, or the defects will be considered waived. *Long vs. Caffrey*, 8 Luzerne Register, 31. 7. A mechanic's lien for work done under a contract, must specify the nature and character of the work done and materials furnished, and the designation of the time when merely the last item of work was done is not sufficient. *Lynch vs. Feigle*, 11 Phila., 247. 8. Since the married woman's act of June 3, 1887, it is not necessary to aver in a mechanic's lien filed against the property of a married woman, that the owner is a married woman, and that the improvement is necessary for her separate estate.

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Milligan vs. Phipps, 153 Pa., 208. 9. Where a claim shows on its face, that it is for work and labor done in the erection and construction of a building, but the details of the contract show that the work was for an alteration to an old building, the claim is contradictory in averment, and will be stricken off on motion. *Morrison vs. Henderson*, 126 Pa., 216. 10. A mechanic's lien for alterations and additions, which does not aver that notice of the intention to file a lien was given to the owner at the time of furnishing the materials or doing the work, is fatally defective. *Morrison vs. Henderson*, 22 W. N., 8. *Kramer vs. Crump*, 28 *Idem*, 16. 11. Where the alterations to a building though extensive, are almost wholly upon the interior of a building, the exterior remaining substantially the same, there is no such change of the structure as to amount to a new erection within the meaning of the act of June 16, 1836. *Patterson vs. Frazier*, 123 Pa., 414. 12. A mechanic's lien against a married woman must show on its face that the work or material was necessary for the improvement or repair of her separate estate, that it was in fact so applied, and was furnished at her instance or request. *Wolfe vs. Oxnard* 152 Pa., 623.

VII. NEGLECT IN BOOK ENTRIES. The intent to give credit to the building may be shown by parol, and is not confined to evidence from book entries. It is no objection to a lien, that the work was done by the claimant at a distance from the building on materials furnished by the contractor. *Singerly vs. Doerr*, 62 Pa., 9.

VIII. NEGLECT IN CLAIM. 1. The formal validity of a mechanic's lien is not put in issue by the plea of payment. No issue to the jury can be raised on the formal deficiencies of the claim filed, such as the want of dates; for these are mere questions of law. Such objections should be raised by demurrer, or by moving to strike off the lien. *Lybrandt vs. Eberly*, 36 Pa., 348. 2. Upon a *scire facias sur* mechanic's claim, the affidavit of defence alleged that the materials for which the plaintiff claimed the lien were not furnished on the

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credit of the building, but on the sole and individual credit of the defendant, the contractor. Held, the affidavit was sufficient. *McDonald vs. Williams*, 4 Legal Opinion, 431.

IX. NEGLIGENCE IN CHARGING. 1. In an action on a mechanic's lien, the plaintiff's book of original entries is admissible, though the materials be charged to the owner of the building instead of the contractor, if accompanied with evidence that the contractor used them, and that in a settlement between him and the owner, the money was set apart to pay the bill. *Barbier vs. Smith*, 38 Pa., 296. 2. Whether materials for which a mechanic's lien has been filed were furnished on the credit of the building or that of the contractor, is a question for the jury. *Hommel vs. Lewis*, 104 Pa., 465.

X. NEGLIGENCE IN CONTRACT WITH OWNER. Where there is no improvement clause in a lease, the lessor's title is not liable to a mechanic's lien for work incurred by the lessee. *Reid vs. Hammond*, 25 *Pittsburg Journal*, 76.

XI. NEGLIGENCE IN CREDIT FOR MATERIAL FURNISHED. Where material used in the construction of a building was not furnished upon the credit of the building, but was sold to contractors upon their personal credit, the right of lien does not exist. *Poole vs. R. W. Co.*, 1 *Monaghan*, 170.

XII. NEGLIGENCE IN DATES. 1. The statement of time in a mechanic's lien is sufficiently certain, although the year be omitted, if facts are stated from which the year can be calculated; as where the lien avers that the work was done within six months last past. *Fairlamb vs. Morton*, 3 *York Record*, 150. 1 *Delaware Co.*, 337. *King vs. Willey*, *Idem*, 195. 2. All that is required to validate a mechanic's lien is such certainty, as will enable those interested to discover during what period the materials were delivered or the work done, so as to individuate the transaction. *Rusk vs. Able*, 90 Pa., 153. 3. Where the copy of the bill annexed to a mechanic's claim sets forth an impossible date, it is no bar to a recovery, on proof of the real date of furnishing the materials. *Shaw vs. Barnes*, 5 Pa., 18. *Hillary vs.*

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Pollock, 13 Pa., 186. 4. To bring a lumped charge in a mechanic's lien filed by a sub-contractor within the provisions of the act of March 22, 1849, the dates when the work was begun and finished must be distinctly stated. *Shields vs. Garrett*, 5 W. N., 120. 5. Where the jury finds certain items of material were furnished under one entire contract, the court may permit the plaintiff to deduct from the verdict the amount of certain items, whose dates in the claim do not correspond with the dates in the book of original entries. *Hill vs. Milligan*, 38 Pa., 237. 6. It is too late to object to formal defects in a claim after pleading in bar. *Humphreys vs. Addicks*, 4 W. N., 88. 7. It is sufficient, if the time of furnishing the materials can be gathered from the whole claim and bill of particulars. *Roche vs. Young*, 4 W. N., 183. 8. A claim for work and materials contained in a single charge, must state when the work was begun and finished. *Ellice vs. Paul*, 2 Phila., 102. *Clark vs. Richardson*, 4 W. N., 559. *Zane vs. Zell*, 6 W. N., 43. 9. Where a building was erected by a mechanic under special contract, and a lien was regularly filed by him for the balance due upon the contract within six months from the completion of the building, he is entitled to payment out of the proceeds of the sale of the property, though the lien was without date as to when the work was done and materials furnished, and only averred it was "within six months last past." *Hahn's Appeal*, 39 Pa., 409. 10. The court may strike from the record an irregular mechanic's lien. A lumber merchant ought to state the day and date of every item; and even a mechanic should give with convenient certainty the commencement and completion of his job. *Lehman vs. Thomas*, 5 W. & S., 262. 11. A mechanic's claim was held to be defective, where it stated no time at which the work was done, the months and days being given in connection with some items, but not the year. *Reneker vs. Hill*, 3 Phila., 110. *Kennedy vs. Bozarth*, 3 W. N., 157. *Masters vs. Jack*, 1 W. N., 232. *Aman vs. Brady*, *Idem*, 262. 12. The time when the materials were furnished, or the work done, is

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essential to the validity of a mechanic's lien. If the year be omitted, there can be no recovery on a *scire facias*. The fact that the book entries of lumber delivered is in ledger form, makes no difference as to the entries, if accompanied by parol proof of their accuracy, and of the delivery of the lumber. *Rehrer vs. Zeigler*, 3 W. & S., 258.

XIII. NEGLIGENCE IN THE DESCRIPTION OF PROPERTY.

1. The record of a mechanic's claim cannot be amended by an alteration in the description of the premises, so as to affect a *bona fide* purchaser, without notice. A mechanic's claim is not a record; the lien docket is the record, and it alone affects encumbrancers and purchasers. *Armstrong vs. Hollowell*, 35 Pa., 485. 2. A party filing a mechanic's lien against a building, must set forth the locality, size and number of stories or other description as shall sufficiently describe the building. A designation merely of the boundaries of the lot is not a sufficient description. Whether the description suffices to identify the property and prevent mistakes on the part of purchasers, must ordinarily be referred to the jury. *Conroy vs. Koch*, 2 Northampton Co., 346. *Brown vs. West, Idem*, 37. Lehigh Valley, Rep., 60. *Brown vs. West*. 6 Lancaster Review, 323. 3. A description in a mechanic's lien which would enable one thereby to go to the exact place, is sufficiently certain. *Cowdrick vs. Morris*, 9 Pa. County, 312. 4. A claim filed against the owners or reputed owners of a three-story brick house on the south side of Walnut street, above Eleventh street, in Philadelphia, held to be sufficiently certain. *Harker vs. Conard*, 12 S. & R., 301. 5. A mechanic's lien which describes as a separate building a part of what is a single building, is defective for want of adequate description. *Hassenfus vs. Packing Co.*, 15 Pa. County, 650. 6. Where the location of the premises is imperfectly set forth in the lien filed, judgment will not be given upon the *scire facias*. *Hemberger vs. Kohler*, 1 W. N., 311. *Wray vs. Haines*, 4 W. N., 358. 7. The description of the premises must be very defective before the court will

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strike off a mechanic's lien for insufficiency of description. This is usually referred to a jury. *Jenkintown vs. Firmstone*, 8 Montgomery Co., 175. 8. It is not necessary that the account should state the very words of the statute: "for or about the erection or construction of the building." Any equivalent words will suffice. *Kelly vs. Brown*, 20 Pa., 446. 9. If a mechanic's claim for lien filed under the act of June 16, 1836, contains a description of the locality, and of the peculiarities of the building, adequate to point out and identify it with reasonable certainty, it is a sufficient compliance with the requirements of the act. *Kennedy vs. House*, 41 Pa., 39. *Linden Steel Co. vs. Refining Co.*, 138 Pa., 10. 10. It is not necessary that the description in a mechanic's lien should be either full or precise; certainty to a common intent is the rule. If there be enough in the description of the situation and other peculiarities of the building to identify it, the statute is satisfied. The act contemplated that claimants should prepare their own papers. *McClintock vs. Rush*, 63 Pa., 203. 11. A mechanic's lien will be sustained, when the property is so described that those acquainted with the neighborhood are able to identify it. *Richardson vs. Glockner*, 3 Pennypacker, 90. 12. A trivial mistake in a lien will not invalidate it, yet the building must be described substantially, so as to identify it. The creditor cannot claim against a building in one street, and then sell by his execution a building in another street. *Simpson vs. Murray*, 2 Pa., 76. 13. Where there is enough in the description of the situation or other peculiarities of buildings to identify them, it is not necessary to give the size, number of stories, or the material of which they are composed. It is for the jury to decide whether a mechanic's claim properly states the location, size or sufficient description of a building. An exception to a lien, that the claimants are non-residents will be dismissed, where the record fails to show non-residence. *Whethered vs. Garrett*, 7 Pa. County, 529, 535. *Brown vs. West, Idem*, 619. *Brown vs. Myers*, 7 Lancaster Review,

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359. 4 Delaware Co., 312. *Holland vs. Garland*, 1 Schuylkill Record, 140. *Kennedy vs. House*, 41 Pa., 39. 14. A mechanic's lien will be held good, where there is enough in the description of the building, its location and size to identify it. A defective description may be amended, even after the statutory time of filing the lien has expired. *Wethered vs. Garrett*, 6 Montgomery Co., 9, 11. *Cook vs. Neal, Idem*, 147. *Snyder Chapel vs. Baer*, 3 Pa., 530. 15. Where materials are furnished for a new building, intended to be used in connection with an old one, the mechanic's lien therefor should be filed specifically against the new erection, and it is fatal to the claim to file it against the general building. *Wharton vs. Douglas*, 92 Pa., 66. 16. A mechanic's lien is not necessarily invalid, because of an obviously inaccurate description of the locality of the premises charged, if the error be not such as to directly mislead from the true location, and if there be enough in the general description in the claim to identify the property and prevent mistake. *Williams' Appeal*, 5 W. N., 24.

XIV. NEGLECT IN FILING. 1. Where a lease authorizes the making of alterations and improvements by the lessee, a mechanic's lien may be filed, if the cost of such alterations is to be borne by the lessor; otherwise if the lessee is to pay for them. *Boteler vs. Aspen*, 99 Pa., 313. 2. An express promise of a contractor to release and discharge the property from all liens, is not a sufficient stipulation to prevent liens being filed. To prevent a contractor from filing a lien, there must be an express covenant against liens. *Evans vs. Grogan*, 153 Pa., 121. *Nice vs. Walker, Idem*, 123. *Murphy vs. Ellis, Idem*, 133. 3. One who has joined as surety in a contractor's bond, conditioned that no lien shall be filed against the building, cannot acquire a lien as sub-contractor. *Hinkson vs. Fairlamb*, 2 Delaware Co., 27. 4. An owner cannot, by consent, authorize the filing of a mechanic's lien to the prejudice of the contractor or material man. *Kimes vs. Walt*, 3 Lackawanna Jurist, 259. 5. The right of a sub-contractor to file a lien is not defeated by the fact that the principal contractor

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had previously filed a lien for the entire contract. *Rice vs. Baxter*, 3 Pa. Dist., 827. 6. Where the owner or contractor dies before the filing of a mechanic's lien, the practice is to file it against them as though they were alive, and to issue the *scire facias* against the executor or administrator, who, it seems, may be substituted on the record, on the suggestion of the owner's death. *Smith vs. Hilbert*, 1 Schuylkill Record, 77.

XV. NEGLECT IN FILING JOINT CLAIM. A joint claim against several adjoining buildings owned by different persons, is not valid. The property of one person cannot be rendered liable to a lien for materials furnished for the property of another. *Kerbaugh vs. Henderson*, 3 Phila., 17.

XVI. NEGLECT IN FORM. 1. A material man, having filed his claim in a manner not authorized by law, may file another in a legal form, the former being a nullity. *Chambers vs. Yarnall*, 14 Pa., 265. 2. It is not an error, for the attorney of the claimant to sign the claimant's name to the statement, where his authority to do so is unquestioned. *Donahoo vs. Scott*, 12 Pa., 48. 3. A mechanic's lien which is defective in form, may be stricken off on motion and rule. The defect must be a fatal one. *Maxfield vs. Church*, 2 Luzerne Register, 120. 4. Where a mechanic's lien which is defective is filed, and the property is sold by the sheriff before the expiration of the six months allowed by law for filing the lien, the claim may be made upon the fund. *Schrader vs. Burr*, 2 Foster, 264. 5. A mechanic's lien which omits to state the nature and value of the work done, and the amount and kind of materials furnished, is incurably defective. *Singerly vs. Cawley*, 26 Pa., 248. *Church vs. Trout*, 28 Pa., 153. 6. The courts of common pleas have inherent power to strike off a mechanic's lien which is defective in form, or irregularly entered. This can be done upon special plea, demurrer, or upon mere notice, perhaps. A mechanic's lien is not a judgment until judgment be entered upon it. A *scire facias* is the legal means of its enforcement, and either party may oblige the other to come to trial. *Stohe vs. McCullough*, 107 Pa., 39.

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XVII. NEGLECT IN FURNISHING MATERIALS TO SUB-CONTRACTOR. Materials furnished to a sub-contractor cannot be made the subject of lien. *Smith vs. Stokes*, 10 W. N., 6.

XVIII. NEGLECT IN INCLUDING ALTERATIONS OF BUILDING. What amount of alterations constitutes a new building under the mechanic's lien law, is in easy cases for the court, difficult ones for the jury. *Furman vs. Mason*, 6 Phila., 222.

XIX. NEGLECT IN INCLUDING DISTINCT ERECTIONS. A mechanic's lien filed against three distinct blocks of buildings, separated by streets, is null and void upon its face. The court may strike it off the record on motion, or on petition and answer, or demurrer. *Goepf vs. Gartiser*, 35 Pa., 130.

XX. NEGLECT IN ITEMS. 1. The proper mode of taking advantage of a defect appearing upon the face of a mechanic's claim is by demurrer or motion to strike off. After pleading to the *scire facias*, such defect must be deemed waived. *Fahnestock vs. Speer*, 92 Pa., 146. 2. It is not a ground to strike off a mechanic's claim, that some of the items are insufficient. If the claim contains one good item which is the subject of a lien, it is enough. *McCristal vs. Cochran*, 147 Pa., 225. 3. Mere irregularities in the filing of the lien will not be inquired into after a trial on the merits. *Palmer vs. Paul*, 3 W. N., 366.

XXI. NEGLECT IN JOINING CLAIMS. Where a man did some work on a building under a sub-contract with the contractor, and also did work under a contract with the owner direct, held, that the two claims could not be joined in one lien. *Simpson vs. Cameron*, 42 Pittsburg Journal, 62. 3 Pa. Dist., 612.

XXII. NEGLECT IN LANGUAGE. 1. A mechanic's lien filed for "construction and erection, alteration of and addition to" a building, when the claim is for alterations, additions and repairs, is not vitiated by the words "erection and construction." *Dickey's Appeal*, 115 Pa., 73. 2. In a mechanic's claim, it is not necessary that the exact words of the act of assembly should be used. Any equivalent words are sufficient. Cer-

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tainty to a common intent is all that is required. *Taylor vs. Wittkamp*, 13 Phila., 31. *Holland vs. Garland, Idem*, 544.

XXIII. NEGLECT IN LIEN FOR REPAIRS. A mechanic's lien for repairs must amount to more than fifty dollars against each house. *Steffy vs. Frost, Idem*, 445.

XXIV. NEGLECT IN LIENING BACK BUILDINGS. A back building, however much it may be enlarged and improved, cannot be treated as a new building, and make it liable to a mechanic's claim. The addition of a bath-house and kitchen is not within the meaning of the mechanic's lien law. *Harris vs. Woolston*, 3 Phila., 376. *Rand vs. Mann, Idem*, 429.

XXV. NEGLECT IN LUMPING CHARGE. 1. A lumping charge in a lien filed by a sub-contractor against the owner of a building and the contractor is clearly bad, and should, on motion, be stricken out. *Fahnestock vs. Speer*, 28 **Pittsburg Journal**, 12. 2. The act of March 24, 1849, authorizes mechanics to file, in certain cases, lumping charges in mechanic's liens in Philadelphia and Chester counties, but it confers such right only upon contractors with the owner of the premises. Sub-contractors must itemize their liens. *Gray vs. Dick*, 97 Pa., 142. 3. A mechanic's lien filed by a sub-contractor, is not bad as a lumping charge when the contract is not only stated, but the dates within which the work was done are set out in the lien. If, however, it contained no particulars of the amount or price of materials, it was bad. *Knowlan vs. Ellis*, 12 Phila., 396. *Shields vs. Garrett, Idem*, 458. *Van Roden vs. Campbell*, 5 W. N., 126. *Gray vs. Dick*, 8 W. N., 435. *Howell vs. Campbell*, 5 W. N., 361.

XXVI. NEGLECT IN THE NAMES OF PARTIES. 1. A mechanic's lien must comply with all statutory requirements. The omission of the name of the owner of the property in the lien is a fatal defect in the claim. Such defect is not cured by naming as owner or reputed owner a lessee of the premises, even if the lessee was erecting the building. *Barclay's Appeal*, 11 W. N., 359. *Steinman vs. Miller*, 12 W. N., 244. 2. If the caption of a mechanic's claim states the name of

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the claimant correctly, it is sufficient, though the name be wrongly stated in the body of the claim. *Booth vs. Hedden*, 1 Delaware Co., 414. 3. Names of new defendants cannot be inserted in a mechanic's lien after the expiration of the six months allowed by law for filing the lien. *Day vs. Garrett*, 4 W. N., 368. 4. A mechanic is not bound to file his lien against one who was not the owner, when the building was commenced, but became so before the lien was filed. *Jones vs. Shawhan*, 4 W. & S., 257. 5. The act of June 11, 1879, does not authorize the introduction by amendment of the name of a person as owner or reputed owner, after the statutory time for filing a lien against such person has expired. *Knox vs. Hilty*, 118 Pa., 430. 6. A plea by defendant in a *scire facias* on a mechanic's claim who was named as owner, that he was not owner, is an improper plea, and will be stricken off on motion. Such a mistake only injures the claimant, as the proceeding is entirely *in rem*. *Spare vs. Wals*, 15 Phila., 263. 10 W. N., 82. *Independent Saving Fund vs. Dillon*, 10 W. N., 506. 7. The omission of the middle initial of a defendant's name in a mechanic's lien will postpone the lien to others correctly entered with the initial. *Stott vs. Irwin*, 2 Chester Co., 137. 8. A mechanic's lien entered against a married woman without mentioning her husband's name or even spelling her name correctly, is invalid. *Van Roden vs. Sterrett*, 7 W. N., 196.

XXVII. NEGLECT IN THE NATURE OF THE WORK DONE. Repairs and additions to a building are not within the purview of the mechanic's lien law. Newness of structure in the exterior is necessary to give notice to purchasers and lien creditors. Whether the erection be new or old is a question for the jury. *Steigerwalt vs. O'Brien*, 3 Luzerne Register, 243.

XXVIII. NEGLECT IN THE PARTIES. Laborers employed by a sub-contractor cannot file a lien. A lien will not be stricken off upon proof *dehors* the record that the person named in the claim as the contractor was not such. *Ferren vs. Perry*, 3 Kulp, 522.

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XXIX. NEGLECT IN RELEASING. A release of a mechanic's lien signed on Sunday is binding, the contract being executed. *Steyert's Estate*, 5 Delaware Co., 490.

XXX. NEGLECT IN SERVICE OF SCIRE FACIAS. 1. In a proceeding on a mechanic's lien to sell the real estate of a decedent, it is sufficient if the *scire facias* is served on the administrator alone. It is not necessary to bring in the heirs at law. *Reece vs. Haymaker*, 42 Pittsburg Journal, 74. 2. Under the act of June 16, 1836, service of *scire facias* sur mechanic's claim must be upon the owner or the tenant occupying the liened premises. *Kane vs. Schmidt*, 2 W. N., 487. *Bradley vs. Totten*, 7 W. N., 16.

XXXI. NEGLECT IN THE SCIRE FACIAS. 1. It seems that on an apportioned claim against several buildings, one *scire facias* against all the buildings for the whole amount cannot be maintained. *Barnes vs. Wright*, 2 Wh., 193. 2. Where materials were furnished for a building to a decedent in his lifetime, and the lien entered after his death, held that a *scire facias* should be issued against his legal representatives, and not in the name of the decedent. *Bristol vs. Golden*, 8 Luzerne Register, 207.

XXXII. NEGLECT IN SPECIFICATION. 1. The claim must set forth the nature of the work or materials, with a clear specification of the building. *Barclay's Appeal*, 13 Pa., 495. 2. Where a contract to erect a building has been entered into with the owner through his agent, the lien need not specify the kind of work done or materials furnished, as in the case of a contract entered into with a contractor. *Harnish vs. Herr*, 98 Pa., 6. 3. A mechanic's lien can only be filed against the house upon which the labor was done, or the materials furnished, the ground upon which it stands, and the out-buildings necessary for its enjoyment. A lien that only describes the house as a certain frame building, giving the size of the house and the township where situate, is fatally defective. *Miller vs. Lenhart*, 1 Pearson, 95. *Denkel's Estate*, *Idem*, 213. 4. A charge in a mechanic's lien filed by a subcontractor, which contains no specifications of materials or

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work done, but merely the aggregate cost of the job, as agreed between the contractor and sub-contractor, is not good as against the owner, and may be stricken off on motion. *Shields vs. Garrett*, 24 Pittsburg Journal, 151.

XXXIII. NEGLECT IN STATEMENT OF CLAIM FILED. 1. A mechanic's lien to bind the estate of a married woman must show on its face every requisite to make it a valid claim against her. It must set forth that such work was necessary for the improvement or repair, as the case may be, of her separate estate. *Loomis vs. Fry*, 91 Pa., 396. 2. The variance is fatal, where a mechanic's lien is filed "for materials furnished for the erection and construction of buildings," and the evidence shows they were for repairs. The *scire facias* upon a mechanic's lien answers as a statement of claim and takes the place of a declaration. *Rynd vs. Bakewell*, 87 Pa., 460. 3. To charge the separate property of a married woman with a mechanic's lien, all the requirements of the act of 1848 must be complied with, and the claim should aver not only the contract of the wife, but that the work was done or materials furnished for the improvement or repair of her real estate. *Shannon vs. Shultz*, 87 Pa., 481. *Kuhns vs. Turney*, *Idem*, 497. 4. A mechanic's claim for work done and materials furnished "in and about the erection, construction, improvement and fitting up of the said buildings, for the use of which they were constructed," will not sustain a lien for repairs and additions. *Wetmore's Appeal*, 91 Pa., 276.

XXXIV. NEGLECT IN THE STRUCTURE LIENED. If a structure is of such a substantial and permanent character that it may be termed a building, it may be encumbered by a mechanic's lien. *Wheeler vs. Pierce*, 167 Pa., 416.

XXXV. NEGLECT IN TAKING A PROMISSORY NOTE FOR THE DEBT. The taking of a note, payable at a future day in satisfaction of a claim for material furnished in the erection of a building, does not prevent the entering of a lien. *Herron vs. Graham*, 3 W. N., 176.

XXXVI. NEGLECT OF AGREEMENT NOT TO FILE. 1. Where

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a contractor agrees that no lien shall be filed, a sub-contractor cannot enter a lien for work done or materials furnished. *Ballman vs. Heron*, 160 Pa., 377. 2. A sub-contractor cannot file a mechanic's lien where the written contract of the principal contractor with the owner stipulates that no lien shall be filed. The covenant, however, must be very clear. *Waters vs. Wolf*, 162 Pa., 153. *Schmid vs. Improvement Co.*, *Idem*, 211. *McMaster vs. School*, *Idem*, 260.

XXXVII. NEGLECT OF CONTRACT FOR WORK. Claims for work done and materials furnished do not become liens on a building from the mere fact that they were in and about its erection. Such claims for lien must be founded on a contract, express or implied, with the owner of the estate sought to be charged. *Tebay vs. Kirkpatrick*, 146 Pa., 120.

XXXVIII. NEGLECT OF CONTINUOUS CHARGES. Where an item in a mechanic's claim, supplied after the lapse of two years from the time of furnishing the next preceding item, was evidently supplied for the mere purpose of keeping alive an otherwise expired lien, the court will strike off the lien. *Kohler vs. Mountney*, 25 Pittsburg Journal, 16. 4 W. N., 288.

XXXIX. NEGLECT OF LEGALITY. A defective or irregular mechanic's lien may be stricken from the record on motion. *Mitchell vs. Martin*, 20 Pittsburg Journal, 60.

XL. NEGLECT OF NEWNESS IN THE BUILDING. Repairs and additions to a building are not within the purview of the mechanics' lien law of 1836. Newness of structure in the exterior is necessary to give notice to purchasers and lien creditors. *Steigerwalt vs. O'Brian*, 2 Foster, 260.

XLI. NEGLECT OF NOTICE OF ASSIGNMENT. The defendant in a mechanic's lien is entitled to actual notice of an assignment of the claim. Mere entries on the margin of the record do not affect him. *Forschner, In re*, 9 Luzerne Register, 239.

XLII. NEGLECT OF NOTICE OF INTENT TO FILE. 1. In the case of a mechanic's lien for repairs, unless notice of intent

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to file, as required by the act, is averred in the lien, it will be stricken off on motion. *Dager vs. Markoe*, 4 Montgomery Co., 98. 2. Under the act of May 18, 1887, a mechanic's lien filed for materials furnished to an addition to a building, which does not contain an averment that the lien creditor gave notice to the owner or his agent, at the time of furnishing the materials, of his intention to file a lien, and where no notice was in fact given, will be stricken off on motion. *Dreibelbis vs. Seasholtz*, 8 Pa. County, 655. 3. A mechanic's lien for repairs filed under the act of May 18, 1877, which does not on its face aver notice to the owner of the premises of the intent to file a lien, or that the work was done for alterations and repairs, can be amended before trial. *Ellston vs. Jury*, 9 Montgomery Co., 12. 4. Under the act of May 18, 1887, where alterations and repairs are made about a building, notice should be given to the owner of the property or his agent at the time of furnishing the materials, of an intention to file a lien. *Moss vs. Greenburg*, 34 W. N., 83. 15 Pa. County, 192. *Kelly vs. Church*, 3 Northampton Co., 413. 5. The act of June 17, 1887, provides that no material man shall file a lien, unless notice of the amount and the character of such claim be given to the owner or reputed owner, his agent or attorney, when the material is delivered on the premises, or within ten days thereafter. *Roth vs. Hobson*, 5 Pa. County, 17. 6. A lien for repairs filed under the act of 1887, must expressly set forth that notice of an intention to file the lien was given to the owner of the premises. *Uber vs. MacAfee*, 6 York Record, 123. *Elston vs. Jury, Idem*, 135. *Foster vs. Montange, Idem*, 154. *Uber vs. MacAfee*, 5 Delaware Co., 186. 10 Lancaster Review, 186.

XLIII. NEGLECT OF ORIGINAL CONTRACTOR. A sub-contractor is not bound by the provisions of a contract between the owner and the principal contractor which do not relate to his part of the work; nor is he defected by the default of such contractor or other sub-contractors. *Cook vs. Murphy*, 150 Pa., 41.

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XLIV. NEGLECT OF OWNER OF PREMISES. The filing of a mechanic's lien does not release the owner of the building from personal liability for such labor or materials as are specified in the lien. *Artman vs. Truby*, 130 Pa., 619.

XLV. NEGLECT OF RIGHT TO FILE. 1. A sub-contractor cannot be deprived of his right to file a lien, except by an express covenant against liens by either contractor or sub-contractor. *Creswell Iron Works vs. O'Brien*, 156 Pa., 172. 2. Laborers employed by a sub-contractor cannot file a lien. Where the contract was with a person, not the owner, the claim must show that he bore to the owner the relation of contractor, architect or builder. *Ferren vs. Perry*, 14 Luzerne Register, 525. 3. Bringing a personal action and obtaining a judgment thereon, do not bar a mechanic from filing his lien for the same subject matter, and issuing a *scire facias* thereon. *Powell vs. Manfg. Co.*, 9 Luzerne Register, 115.

XLVI. NEGLECT OF SECURITY. Where there is a special contract between a mechanic and the owner of a building, the former must look to his contract alone for his security, and cannot resort to the remedy of a mechanic's lien. *Haley vs. Prosser*, 8 W. & S., 133.

XLVII. NEGLECT OF SPECIFICATIONS OR ITEMS. A mechanic's claim for a certain account, setting forth that it was for work done or materials furnished under a contract, is regular on its face. *Miller vs. Bedford*, 6 W. N., 144.

XLVIII. NEGLECT OF SUB-CONTRACTOR'S RIGHTS. A sub-contractor has no right of lien at common law or in equity. It is a creature of statute alone. If the owner of land stipulates with the builder for the erection of a house upon it, with the provision that no mechanic's lien shall be filed against it, all sub-contractors are bound thereby. *Schroeder vs. Galland*, 1 Lackawanna Jurist, 357. *Harlan vs. Rand*, 27 Pa., 511.

XLIX. NEGLECT TO ADJUDICATE. Before participating in the proceeds of a sheriff's sale, the amount due upon a mechanic's or municipal lien must be determined by a writ of *scire facias*, by proceedings before a commissioner appointed to

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distribute the fund, or by admission. *Nontro vs. Dietrich*, 1 Northampton Co., 129.

L. NEGLECT TO ALLOW AMENDMENTS. The act allowing amendments to mechanic's liens is peremptory and binding on the court, and will justify the addition of the name of a wife as an owner and defendant at any stage of the proceedings. *Jennings vs. Brooks*, 10 Luzerne Register, 215.

LI. NEGLECT TO AMEND. 1. A mechanic's lien regularly filed, may be amended in any stage of the proceedings, when such amendment is conducive to justice and a fair trial. So says the act of June 11, 1879. *Flory vs. Haverford College*, 3 Montgomery Co., 110. *Arnold vs. Abraham*, 9 Lancaster Review, 74. 2. After the expiration of the six months allowed for the filing of a mechanic's lien, no material amendment of the claim filed will be admitted, yet where the amendments were immaterial, they will not invalidate the claim. *Fourth Avenue Church vs. Schreiner*, 88 Pa., 124. 3. New parties cannot be introduced by amendment to a mechanic's lien after the expiration of the six months allowed for filing the lien. *Horton vs. Watson*, 1 Lackawanna Jurist, 304. *O'Neill vs. Hurd*, 11 Phila., 171. 4. A mechanic's claim cannot be amended in any particular after the lapse of the six months within which the claim must be filed. *Nason Co. vs. Jefferson College*, 4 W. N., 369. 5. The name of the owner in a mechanic's claim cannot be amended after the lapse of the six months within which the claim must be filed. *Nason Co. vs. Hospital*, 12 Phila., 483.

LII. NEGLECT TO APPORTION. 1. The failure to apportion a joint claim against several houses will not avoid the lien as to purchasers for value without notice. *Beitzel vs. Stair*, 2 Pa. Dist., 337. 2. The failure to apportion claims in joint mechanics' liens does not vitiate the lien, but merely postpones it to all other liens by judgment, mortgage or otherwise. *Bender vs. Stair*, 5 York Record, 97. *Bectel vs. Stair*, 6 *Idem*, 119. *Gross vs. Stoltz*, 2 Pa. County, 190. 3. Permission to amend a mechanic's lien by apportioning the claim

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will be granted under the act of 1879. *Hoffmaster vs. Knupp*, 15 Pa. County, 141. 4. Where a mechanic's lien against several contiguous properties is not apportioned according to the requirements of the act of June 16, 1836, it is postponed to the lien of other creditors. *Reilly vs. Elliott*, 6 W. N., 12. *Kline's Appeal*, 43 Pa., 422. *Smith vs. Wireman*, 1 W. N., 90. 5. Two adjoining buildings separated by a solid brick partition from the cellar to the attic, with no internal communication from a block of two buildings, and a mechanic's lien not apportioned between them, cannot be sustained. *Roat vs. Frear*, 167 Pa., 614.

LIII. NEGLECT TO AUTHORIZE FILING. An owner cannot, by consent, authorize the filing of a mechanic's lien to the prejudice of the contractor or material men. *Kimes vs. Walt*, 10 Montgomery Co., 12.

LIV. NEGLECT TO BIND PROPERTY OF MARRIED WOMAN. A mechanic's lien filed against the property of a married woman, but not averring the coverture, and that the labor was done and materials furnished upon her authority or with her consent, for the improvement of her separate estate, is fatally defective and void. *Shryock vs. Buckman*, 121 Pa., 248.

LV. NEGLECT TO CHARGE THE OWNER OF A BUILDING. The charges may be made against the contractor exclusively without any reference to the owner or the building, though in such case there must be other proof that the materials were furnished for the building. *Wolf vs. Batchelder*, 56 Pa., 89.

LVI. NEGLECT TO CHARGE PROPER PARTIES. 1. Where a tenant contracts with a landlord to build or to repair buildings for compensation to be made by the landlord in money or in occupation and use of the premises, the tenant is the landlord's agent, building or repairing for him, and the building is liable to lien. *Hall vs. Parker*, 94 Pa., 109. 2. Where a landlord in writing extended the lease of his tenants in consideration that they would make certain improvements at their own cost, held, that the premises were not liable to the lien of mechanics

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for making such improvements. *McClintock vs. Criswell*, 67 Pa., 183.

LVII. NEGLECT TO DEFEND. Where the defendant in a mechanic's lien enters security under the act of March 6, 1873, and has the lien discharged, he is bound, nevertheless, to file an affidavit of defence against the claim. *Williams vs. Brown*, 18 W. N., 48.

LVIII. NEGLECT TO FILE. 1. A mechanic's lien, to be valid, must be filed within six months from the delivery of the materials or the work done. If in pursuance of a contract, the lien must be filed within six months after the contract was performed. *Bolton's Appeal*, 3 Grant, 204. *Baptist Church vs. Trout*, 28 Pa., 153. *Bartlett vs. Kingan*, 19 Pa., 341. *Hern vs. Hopkins*, 13 S. & R., 209. *Geiss vs. Rapp*, 1 Walker, 111. 2. A claim to perpetuate the lien of a mechanic or a material man, if within the time prescribed by statute, may be filed after a judicial sale of the premises. When the purchase money is substituted for the land, the lien attaches to it. *Burt vs. Kurtz*, 5 R., 246. 3. A lien will be struck off on motion when it appears not to have been filed within six months. *City vs. Sloanaker*, 6 Phila., 48. *Brown vs. Lodge*, 1 W. N., 443. *Dalzell vs. Patterson*, 6 W. N., 493. *Hall vs. Dougherty*, 8 W. N., 255. 4. The registry of a mechanic's lien is not a record, and the plea of *nul tiel* record is a nullity. *Davis vs. Church*, 1 W. & S., 240. 5. Where material for additions and repairs were furnished prior to a sheriff's sale, but the claim was not filed until after the sale, there is no lien against the premises in the hands of the sheriff's vendee. *Edridge vs. Madden*, 7 W. N., 226. 6. A lien filed December 2, for a claim dated June 2, is within the six months required by the mechanics' lien law, the first day being excluded, and the last day included in the six months. *Esler vs. Peterson*, Leg. Gaz. Report, 303. 7. The act of June 17, 1887, provides for the filing of a mechanic's lien by any sub-contractor, mechanic or laborer, and requires him to file his claim within sixty days, setting forth the nature of the work and the time. No material man

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can file a lien, unless notice of the amount and character of his claim be given to the owner, or reputed owner, his authorized agent or attorney, when the material is delivered on the premises or within ten days thereafter. *Gibson's Homœopathic Ass'n, Idem*, 63. *Roth vs. Hannum*, 21 W. N., 64. 8. A mechanic's lien for repairs, alterations and additions under the act of August 1, 1868, filed after the death of the debtor but within six months after the completion of the work, is not entitled to priority, over the general debts of the decedent in distribution of the proceeds of a sheriff's sale of the property. *Hoff's Appeal*, 102 Pa., 218. *Watts vs. Vezin*, 12 W. N., 250. 9. Mechanics' liens are secret liens until they are filed, and this may be done within six months after the work is done or the materials furnished, and then the lien runs back to the commencement of the building. *Miller vs. Hershey*, 59 Pa., 69. 10. Where work done under a contract is substantially furnished, and extra work is done thereafter to supply a deficiency, this will not extend the time for filing the lien. *McKelvey vs. Jarvis*, 87 Pa., 414. 11. Where work under a contract was completed at a certain date, and a lien not filed until after six months had expired, it would be too late unless within the six months some alterations had been made by the mechanic and charged in his claim filed, as part of it, by consent of the owner of the premises. *Parrish's Appeal*, 83 Pa., 111. 12. Where a mechanic's lien was filed for materials furnished at different dates, in the absence of a special contract, it was held that no recovery could be had except for materials furnished within six months prior to the filing of the lien. *Phillips vs. Duncan*, 5 Clark, 358. 13. A mechanic's claim, which has not been filed within six months from the time of the completion of the buildings, is not a lien. *Ramsey's Appeal*, 2 W., 228. 14. At the time a mortgage was recorded, there was no prior lien against the premises. Subsequently a mechanic's claim was filed, and it was alleged that the building was commenced prior to the mortgage, and that the lien of the claim antedated the mortgage. The court rejected this evi-

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dence, holding that the bidder at sheriff's sale is not bound to look beyond the record. An entirely different state of things exists in the case of the mortgagee. If when he takes a mortgage on a building, work has been commenced, he should know that the liens of mechanics and material men for work done subsequently will relate back to the commencement of the building. *Reading vs. Hopson*, 90 Pa., 497. 15. Mechanics' liens must be filed within six months after the work has been done or the materials furnished. The claim filed must set forth the nature or kind of work done, the kind and amount of materials furnished, and the time. This rule must be the more strictly complied with by the sub-contractors. It is doubted whether a mechanic's claim can be amended after the six months in which it may be filed has elapsed. *Russell vs. Bell*, 44 Pa., 47. 16. The destruction of a building by fire or storm before or after the filing of a mechanic's lien and before trial, will prevent a recovery on such a lien. *Church vs. Stetler*, 26 Pa., 246. *Wigton vs. Brooks*, 28 Pa., 161. *Campbell vs. Coolbaugh*, 3 Luzerne Leg. Reg., 93. *Magargal vs. McDowell*, 8 Montgomery Co., 111. *Third Presbyterian Church vs. Stetler*, 4 Pittsburg Journal, 46. 17. Taking a bond, with warrant of attorney, and entering judgment upon it, is not filing a claim within the mechanic's lien law. *Williams vs. Tearney*, 8 S. & R., 58.

LIX. NEGLECT TO FINISH THE BUILDING. Where a building erected under contract is substantially completed, full performance in minor particulars may be dispensed with by the party to whom it is due; and a mechanic's lien filed by the builders thereafter is valid. *Stewart vs. McQuaide*, 48 Pa., 191.

LX. NEGLECT TO INDEX. 1. A mechanic's lien is not a record. The lien docket is the record, and it alone affects encumbrancers and purchasers. If the claim is not properly indexed, nor indexed at all, encumbrancers are not bound to search through the docket for a claim which has nothing in the index to show its existence. *Cessna's Appeal*, 35 Pitts-

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burg Journal, 27. 4 Lancaster Review, 319. 19 W. N., 530. 2. A mechanic's lien regularly filed, in proper form and time, and properly entered in the mechanic's lien docket, is valid as between the parties to it, though the prothonotary omitted to alphabetically index their names in that docket *Irish vs. Harvey*, 44 Pa., 76.

LXI. NEGLECT TO ITEMIZE. 1. Where a mechanic's lien is filed upon a contract, and the claim asserts the work to have been done as contracted for, it is not necessary to set out the items and dates. *Haines vs. Burr*, 1 Phila., 52. *McNeill vs. O'Neill*, 2 W. N., 510. *Young vs. Lyman*, 9 Pa., 449. 2. A claim for materials, without specification of kind or quantity, is bad. The act of 1836 requires that the statement filed shall set out the amount claimed to be due, the nature and kind of the work done, or the kind and amount of the materials furnished, and the time. *Lauman's Appeal*, 8 Pa., 473. *Noll vs. Swineford*, 6 Pa., 187. But see *Richabaugh vs. Dugan*, 7 Pa., 394. 3. Where a sub-contractor, files his lien, and fails to set out in his claim the amount of work done and materials furnished by items, the lien will be stricken off on rule to show cause. Otherwise where the defendant pleads and goes to trial. *Lord vs. Church*, 6 Luzerne Register, 119. 4. A mechanic's lien filed by a sub-contractor must set out explicitly the nature of work done or the kind and amount of materials furnished. When the lien is filed by the original contractor, this itemized statement is not required. *Peirce vs. Baker*, 2 Delaware Co., 231. *Caldwell vs. Carter*, 153 Pa., 310. *Pusey vs. Sharpless*, 3 Delaware Co., 368.

LXII. NEGLECT TO KEEP ORIGINAL ENTRIES. Under the mechanic's lien law, it is not necessary that the sale and delivery of materials should be charged in a book of original entries. Any evidence which satisfies a jury that they were furnished for and about the erection or construction of the building suffices. *Wolf vs. Batchelder*, 56 Pa., 89.

LXIII. NEGLECT TO NAME CONTRACTOR. 1. If a claim filed for work done, under a bargain with the contractor, not

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being the owner, omit the contractor's name, it is a fatal defect. The omission is not cured, as against lien creditors, by a subsequent confession of judgment by the owner. *McCay's Appeal*, 37 Pa., 125. 2. The omission to name the contractor is fatal to the lien. An amendment, adding his name, will not be allowed after the expiration of the six months limited for filing the lien, against the owner's objection. *Murta vs. Stephenson*, 2 Pa. Dist., 480. *Dennis vs. Williamson, Idem*, 481. *Goodfellow vs. Manning*, 148 Pa., 96. 3. Where there is a contractor, his name must be included in the claim filed, but where there is no contractor, the lien is good when the owner or reputed owner is named. *Williams vs. McCracken*, 3 Luzerne Law Times, N. S., 19.

LXIV. NEGLECT TO NAME OWNER OF PROPERTY. 1. The mechanic's lien law of June 16, 1836, requires that the lien shall specify the owner or reputed owner of the premises. Where the owner is not a party to the contract, and is not mentioned in the lien as owner, the lien will, on motion, be stricken off. *Burger vs. O'Hara*, 7 Montgomery Co., 108. 6 Kulp, 188. *Houston's Appeal*, 6 W. N., 162. *Northern Liberties vs. Myers*, 2 Parsons, 242. 2. Where the captions of a mechanic's lien and the bill of particulars attached show the name of the owner of the premises, but the same has been inadvertently omitted from the body of the claim, the court may amend, even after the expiration of the six months. *Nichols vs. Maloney*, 5 Kulp, 149. 3. It is a fatal defect in a mechanic's lien, filed against nine lots, and the houses erected on them, that the name of the owner of two of them does not appear in the lien. *Steinman vs. Miller*, 2 Pennypacker, 190. 3. A mechanic's lien filed against one as contractor and reputed owner, but not naming the real owner, is fatally defective. *Steinman vs. Miller*, 3 York Record, 147.

LXV. NEGLECT TO NAME PARTIES. 1. The survivor of two former contractors is rightly named as the sole contractor in the claim filed. *Dick vs. Stevenson*, 9 W. N., 411. 2. A mechanic's lien filed against the husband alone as owner and

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a contractor, but not referring to the wife or making her a party to the record, is not a lien against her estate. There is no relation of trustee and *cestui que* trust, or any other privity of estate, which can possibly make a sale in the name of one carry the estate of the other. What notice would the claim against her husband be to subsequent lien creditors or purchasers from her? The claim should be filed against the wife and appear in the record in order to charge her estate. *Finley's Appeal*, 67 Pa., 456.

LXVI. NEGLECT TO PAY CLAIM. When the owner and contractor is the same person, there may not only be a mechanic's lien filed against his property and prosecuted to judgment, but a personal action may be brought against him on his contract. A party may have many securities for the same debt, and may proceed on them all until he obtains satisfaction. *Artman vs. Truby*, 25 W. N., 165.

LXVII. NEGLECT TO PRESS. The act of June 16, 1836, holds that, whenever a mechanic's lien is filed against a building, the owner or any person interested may call the claimant into court, which tribunal may proceed in like manner as if a *scire facias* had been issued and duly served and returned. *Haines' Appeal*, 73 Pa., 172.

LXVIII. NEGLECT TO PRESS SCIRE FACIAS. Where no judgment has been obtained on a mechanic's lien within five years from the issuance of a writ of *scire facias*, held that the lien of the claim had expired. *Garbian vs. McGee*, 2 Northampton Co., 128. *South Easton vs. Norton*, Lehigh Valley Rep., 378. *Hunter vs. Lanning*, 76 Pa., 25.

LXIX. NEGLECT TO PROSECUTE. 1. A *scire facias* cannot be issued to revive the lien of a mechanic's claim. It should be levied and duly prosecuted within five years, otherwise the lien of the claim will be lost. *Collins vs. Schock*, 14 W. N., 485. *McGonigle vs. McDonough*, 1 W. N., 360. 2. A mechanic's lien is not a judgment, and the decedents act of February, 1834, does not extend its lien beyond five years by

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reason of the death of the owner of the building within that period. *Hershey vs. Shank*, 58 Pa., 382.

LXX. NEGLECT TO SANCTION. Public institutions and the buildings thereof are not the subject of a mechanic's lien. *Patterson vs. Reform School*, 92 Pa., 229.

LXXI. NEGLECT TO SATISFY. A note taken in satisfaction for a mechanic's lien is security when paid, but not otherwise. *Herron vs. Graham*, 24 *Pittsburg Journal*, 50.

LXXII. NEGLECT TO SECURE. 1. Where the plan of a building is changed and greatly enlarged, while in the course of erection, the liens of mechanics and material men, subsequent to such change, relate only to the commencement of the alterations, and are subject to all prior liens on the structure. *Norris' Appeal*, 30 Pa., 122. 2. Where there is an entire contract for plastering several houses for a gross sum, work done on one of them will not keep alive the mechanic's lien against the others, upon which no work was done within six months from the time of filing the joint claim. *Wilson vs. Forder*, 30 Pa., 129.

LXXIII. NEGLECT TO SIGN. A mechanic's lien need not be signed at the bottom by the claimant. It is sufficient if his name appears in the body of the lien. *Sprecher vs. Single*, 3 Delaware Co., 148. 4 *Lancaster Review*, 65.

LXXIV. NEGLECT TO STRIKE OFF. 1. An appeal does not lie from the refusal of the court to strike off a mechanic's claim. In such a case there is no final judgment. *Aliter*, if the court strike off the claim, for then its action is final. *Carter vs. Caldwell*, 147 Pa., 370. 2. The court will not strike off a mechanic's lien upon allegations of facts which do not appear of record therein. A claimant may file one or more liens for the same claim, where there is uncertainty either in the title of the owners or the names of the contractors. *Clark vs. Miller*, 14 Pa. County, 227. *Frick vs. Gladdings*, 1 Foster, 288. 10 Phila., 79. *Smith vs. Robbins*, 5 Kulp, 230. 2 *Luzerne Law Times*, 36. 1 C. P. Reporter, 106. 3. A mechanic's lien cannot be stricken off by the court for insufficient descrip-

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tion of the ground and building ; it is a question for a jury. *Hoffmaster vs. Knupp*, 15 Pa. County, 140. 4. A defective or irregular mechanic's claim may be stricken from the record on motion. *Mitchell vs. Martin*, 3 Pittsburg, 474.

LXXV. NEGLECT TO SUSTAIN, IN CASE OF FIRE. 1. Where a building, subject to a mechanic's lien, is destroyed by fire, the lien falls, inasmuch as it attaches to the land only incidentally, as necessary to the proper use of the building. *Baird vs. Otto*, 2 Pa. Dist., 485. 2. When the building ceases to exist, as where destroyed by fire or other accident, the lien is gone. It will not attach to the materials remaining after the destruction of the building, nor to buildings erected as appurtenances. *Wigton's Appeal*, 28 Pa., 161.

LXXVI. NEGLECT TO USE MATERIALS. 1. If materials are furnished towards the erection of a building, although not used in it, the price of them may be recovered in an action on a mechanic's claim against the building. *Miller vs. Blessing*, 17 Phila., 308. *Busch vs. Sener*, 1 Pennypacker, 22. *Hershey vs. Gunn, Idem*, 40. *Wallace vs. Melchior*, 2 Browne, 104. 2. Under the act of June 16, 1836, a material man is not entitled to a lien for materials furnished to the contractor for his temporary use in the erection of a building, and not forming a part of the structure, even though furnished on the credit of the building. *Oppenheimer vs. Morrell*, 118 Pa., 189.

Mercantile Agencies.

I. NEGLECT IN CONFIDENTIAL COMMUNICATIONS. We cannot say that a mercantile agency may communicate to every subscriber statements prejudicial to the business or moral standing of the merchants of the land, whether the persons to whom the information is sent have an interest in receiving it or not. A mercantile agency, if properly managed, may be of the greatest service to business men, but if carried on with a reckless disregard to the rights of others may be converted into an evil, against which no man can protect himself. *Comm. vs. Stacy*, Leg. Gaz. Report, 120.

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II. NEGLIGENCE IN REPORTS. 1. A company doing business as a commercial agency, and for a consideration giving to subscribers a printed book information of the standing of firms, corporations and individuals, will be liable to a subscriber for negligently publishing in such book a misstatement upon the subject which misleads him to his injury. Where the contract between the company and its subscribers stipulated, that the company should not be liable for any loss occasioned by the neglect or other act of any officer or agent of the company in procuring, collecting and imparting information, and that the company did not guarantee its correctness, held, that the exemption from liability applied to the negligence of particular officers or agents, but not to the negligence of the company as such, wherefore the company was liable for a gross error in the books, occurring in its printing. *Crew vs. Bradstreet Co.*, 134 Pa., 161. 2. In the present case, the report of a mercantile agency stated that a judgment had been entered against a grocer, when in reality it was a verdict only, a judgment upon which afterwards reversed. The trial judge charged, that if the defendant was not actuated by malice, but supposed a verdict was equivalent to a judgment, and made the publication in the line of duty to keep his subscribers advised of the commercial standing of the plaintiff, the latter could not recover damages. *Hessel vs. Bradstreet Co.*, 141 Pa., 503. 3. A defendant who had agreed to furnish information as to the credit of others, and whose negligence had caused loss to the plaintiffs, cannot set up as a defence that the communications were merely verbal, and that they are required by statute to be in writing, in order to sustain his liability. Such a statute is intended to protect careful men, and cannot be used to shield one who has been guilty of negligence or misfeasance. *Sprague vs. Dun*, 12 Phila., 310.

III. NEGLIGENCE OF AGENTS. A mercantile agency is not liable for a loss to a subscriber acting upon information collected by its agents and communicated to him under a contract in writing, providing that the agency shall not be respon-

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sible for any loss caused by the neglect of any of the servants, clerks or attorneys of said agency. Under such a contract, there is no liability on the part of the agency even for gross negligence in collecting and communicating information by its agents. *Duncan vs. Dun*, 7 W. N., 246.

IV. NEGLECT OF CORRESPONDENT. A mercantile agency having receipted for a claim for collection in another city, transmitted the claim to its correspondent in such city, who collected the money and failed to pay it over. Held, that the agency was liable for his neglect. *Bradstreet vs. Everson*, 1 Luzerne Register, 738.

V. NEGLECT TO GIVE CORRECT INFORMATION. Public policy does not forbid a mercantile agency from contracting for exemption from liability for loss resulting from incorrect information negligently given by its officers or agents to persons dealing with it. *Crew vs. Bradstreet*, 6 Pa. County, 360.

Merchants.

NEGLECT IN REMOVING GOODS. It is not unlawful in itself to take merchandise from the upper stories of a warehouse, by lowering it on a rope, or even by dropping it in a careful manner, down the outside of the building; it is only a negligent way of doing it, which makes the person or his employer liable in case an injury results from his carelessness. *McCullough vs. Hemingway*, 14 W. N., 16.

Merger.

NEGLECT OF INTENT. Merger is always a question of intent, and is never allowed to take place against the interest of the parties. *Mawhinney vs. Shallcross*, 10 Pa. County, 102.

Mills.

I. NEGLECT BY POLLUTION OF STREAM. In an action by the owner of a water power against the owner of a mill higher up the stream, for permitting refuse to be conveyed into the plaintiff's pool, evidence both of the value of the land with

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and without the deposit, and of the cost of removing the refuse is admissible. *Seely vs. Alden*, 61 Pa., 302.

II. NEGLIGENCE IN BACKING WATER. It is actionable to flow water back in the tail race of another's mill, whether any actual damages are or are not caused thereby. *Graver vs. Sholl*, 42 Pa., 58.

Mines.

I. NEGLIGENCE BY FLOODING. 1. In trespass for breaking a dam by which the workmen were driven from the mines by the water, evidence of the amount each miner would produce and of the expense of keeping mules whilst the mines could not be worked, is admissible on the question of damages. *Douty vs. Bird*, 60 Pa., 48. 2. Where neighboring mine owners are permitted to operate through the plaintiff's gangway, they are not justified in wilfully filling up the plaintiff's shaft with water, even if the plaintiff had been guilty of counter negligence. *McKnight vs. Ratcliff*, 44 Pa., 156.

II. NEGLIGENCE IN CONSTRUCTING GANGWAY. If the operator of a coal mine has employed a competent person to drive a gangway in a mine, he is not liable for damages by the death of an employee, even though it resulted from the defective construction of said gangway, if he had no knowledge or notice of such defect. The operator of a coal mine fulfils the measure of duty to his employees, if he commits the work to careful and skillful bosses, who conduct the same to the best of their ability. *Waddell vs. Simoson*, 112 Pa., 567.

III. NEGLIGENCE IN DEPOSITING COAL DIRT. The owners of coal lands are not liable for the acts of their tenants, not done by their authority, in dumping coal dirt into a neighboring stream. Throwing the dirt into the stream is a tort, but such tort may be several when committed by the owners of several collieries along the stream, and does not become joint because its consequences united with other consequences. *Little Schuylkill Nav. Co. vs. Richards*, 57 Pa., 142.

IV. NEGLIGENCE IN DIGGING ORE. A person who is not a

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tenant in possession, but possesses a right to dig ore, is not guilty of committing a waste or trespass when he takes out more ore than his contract calls for, and a court of equity cannot restrain him by injunction. He may be sued in *assumpsit* for the surplus. *Grubb's Appeal*, 90 Pa., 228.

V. NEGLECT IN DUMPING REFUSE. A right of action exists against mine owners for pumping refuse into a mountain stream and thereby polluting water which flows through the lands of another. However laudable industry may be, its managers are still subject to the rule, that their property cannot be so used as to inflict injury on the property of others. For slight inconveniences, they should not be held responsible. *Sanderson vs. Coal Co.*, 86 Pa., 401. *Penna. Coal Co. vs. Sanderson*, 94 Pa., 307.

VI. NEGLECT IN ENTERING SHAFT. It is the duty of a person about to step into the bottom of a shaft in a coal mine in which, as he knows, heavy cages are constantly in motion, to stop, look up the shaft and listen, to ascertain whether a cage is descending. An employee in a mine, familiar with the workings of a shaft used for hoisting coal, stepped into the bottom of the shaft on the way to his work, and was struck and injured by a descending cage, which he had failed to look for. Held, that he was guilty of contributory negligence. *McDonald vs. Iron & Coal Co.*, 135 Pa., 1.

VII. NEGLECT IN ERECTING BREAKER. The anthracite mining regulation of 1891 forbids the erection of a breaker nearer than two hundred feet from the opening of a mine. This provision applies also to the case of the rebuilding of a breaker totally destroyed by fire. *Comm. vs. Kingston Coal Co.*, 6 Kulp, 241.

VIII. NEGLECT IN EXCAVATING. An owner of land who, in mining iron ore upon it, drains water from land of an adjoining owner, thereby destroying a spring upon it, is not liable in damages therefor, if there be no evidence of malice or negligence. *Haldeman vs. Bruckhart*, 45 Pa., 514.

IX. NEGLECT IN MACHINERY. If the machinery be of an

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ordinary character and such as can, with reasonable care, be used in a mine without danger to the employees, it is all that is required of the employer. This is true, though the master has in use a machine less safe than some others in general use, or that there was another and safer mode of doing the business. *Drew vs. Coal Co.*, 3 Kulp, 207.

X. NEGLIGENCE IN POLLUTING WATER COURSE. 1. Where refuse and waste is dumped by a coal company into a stream on its own land and carried to the land of another filling the bed thereof, and accumulating upon a neighbor's bottom land, rendering the same unproductive and worthless, such company is liable for damages in an action of trespass. Each act is a distinct cause of action for the portion of the injury resulting from it. *Gallagher vs. Kemmerer*, 144 Pa., 509. 2. One operating a coal mine in the ordinary manner, may upon his own lands drain or pump the water which percolates his mine into a stream which forms the natural drainage, although the quantity of water may thereby be increased and its quality so affected, as to render it totally unfit for domestic purposes by the lower riparian owners. It is *damnum absque injuria*. *Penna. Coal Co. vs. Sanderson*, 113 Pa., 126. 3. In an action by a property owner against a coal company for polluting a private water course, the measure of damages is the sum which will compensate the plaintiff for the actual loss he sustained by reason of the said pollution prior to instituting the suit. *Sanderson vs. Coal Co.*, 102 Pa., 370.

XI. NEGLIGENCE IN UNDERMINING IMPROVED PROPERTY. Courts will enjoin mine owners from working their veins immediately beneath the tracks of a railroad which they do not own, and whose occupancy of the surface has been without objection of such land owners. *Lawrence's Appeal*, 78 Pa., 365.

XII. NEGLIGENCE IN THE USE OF LAMPS. Under the provisions of the mine ventilation act of March 3, 1870, mining bosses and miners are fellow-servants, and where the death of the latter is caused by the negligence of the former in leaving

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his lamp uncovered, resulting in an explosion of gas, the owner of the mine is not responsible therefor. *Delaware & Hudson Canal Co. vs. Carroll*, 89 Pa., 374.

XIII. NEGLIGENCE IN WORKING. 1. Where owners of a mine have worked beyond their line into adjoining land, a court of equity will enjoin. Where, however, the line is in dispute, an injunction will not be granted until the rights of the parties are settled at law or in equity. *Alter vs. Bowman*, 2 Foster, 298. 2. Possession of the surface of land gives no right whatever in the coal below, where the coal and surface are distinct estates; hence intrusion by the possessors of the surface into the coal renders them trespassers, and liable as such. *Ashman vs. Wigton*, 20 W. N., 280. 3. A mining company is responsible for negligence of its engineer in mining beyond its own land. If such trespass is committed ignorantly, the measure of damages should be the value of the ore in place. If done wantonly, the jury may add a reasonable amount to compensate for the wanton wrong. *Blair Iron Co. vs. Lloyd*, 1 Walker, 158. 4. Trover lies for coal mined and carried away from another's land by mistake. The measure of damages is the fair value of the coal in place, and such injury to the land as the mining may have caused. In very strict form, trespass is the proper remedy for a wrongful taking of personal property, yet the trespass may be waived and trover maintained. *Forsyth vs. Wells*, 41 Pa., 291. 5. The orphans' court has no jurisdiction to restrain a tenant for life from working opened mines to exhaustion, on the petition of the guardian of minors entitled in remainder. *Giffin's Estate*, 33 Pittsburgh Journal, 310. 6. Under the act of May 8, 1876, if any person or corporation shall mine coal or iron or other mineral, knowing it to be upon another's lands, without the consent of the owner, the party shall be guilty of a misdemeanor, and also shall be liable to pay to such owner double the value of such material, and in case of the conversion of the same to the use of such offender, treble the value thereof, to be recovered, with costs of suit, by action of trespass, or

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trover. The measure of damages is based upon the fair value of the coal in place. If this be not shown, then what it was worth at the pit's mouth, or in a distant market, deducting the freight. *Oak Ridge Coal Co. vs. Rogers*, 108 Pa., 147. 7. A patent granted by the state under the act of April 11, 1848, entitling the patentee to the coal and minerals under the bed of a navigable river, does not entitle him to mine under an island in the river which was subject to sale. *Penna. Coal Co. vs. Winchester*, 109 Pa., 572. 8. Mines and quarries open at the beginning of a life estate may be worked by the life tenant even to exhaustion, without rendering him liable in damages for waste. *Sayers vs. Hoskinson*, 110 Pa., 473. *Shoemaker's Appeal*, 106 Pa., 392. 9. A lease which gives the right to take out all the coal beneath a certain surface, confers also the right to make all necessary openings to reach the coal. The fact that a spring is injured by the excavation is not important. Its destruction, if, necessary incident to mining under the lease, would be *damnum absque injuriâ*. *Trout vs. McDonald*, 83 Pa., 144.

XIV. NEGLIGENCE OF BOUNDARIES. Where the lessor of two adjoining mines gives the lessee of one mine the power to mark a theoretical line on his premises, he cannot be treated as a trespasser if, in an honest attempt to ascertain the line, he should chance to pass over it. In such case, the lessor can only recover damages for improper mining or criminal negligence. *Freck vs. Locust Mountain Coal Co.*, 86 Pa., 318.

XV. NEGLIGENCE OF PROPER DRAINAGE. When water, following the law of gravitation, after the removal of coal percolates through unknown fissures into a lower adjacent mine, its owner cannot complain of the injury done by the owner of the upper mine. The latter party, however, is not absolved from providing reasonable means to prevent the injurious inflow of water into the adjoining mine. *Prevost vs. Gorrell*, 5 W. N., 149.

XVI. NEGLIGENCE OF FELLOW-EMPLOYEE. 1. An engineer employed to run an engine at a colliery is a fellow-servant of

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the miners, whom the engineer raises and lowers in the shaft of the mine ; and an injury to one of the latter by the act of the former will not render the owners of the mine liable. So also is a mining boss a fellow-employee. *Bradbury vs. Coal Co.*, 157 Pa., 231. *Lincoski vs. Coal Co.*, *Idem*, 153. 2. A mining company is not liable for an injury to a miner caused by a mistake of an engineer in the employ of the company, where there was no evidence that the engineer was incompetent. *Mulhern vs. Coal Co.*, 161 Pa., 270. 3. A mining boss, under the act of April 28, 1877, is a fellow-servant with the miners and laborers, and his employer is not responsible for his negligence, if due care was used in his selection. *Redstone Coke Co. vs. Roby*, 19 W. N., 221.

XVII. NEGLECT OF INSPECTORS. It is the duty of mine inspectors to have a vigilant and constant care over the mining operations in their respective districts, and visit every colliery at least four times a year. *Comm. vs. Waddell*, 6 Kulp, 95.

XVIII. NEGLECT OF LESSEE. 1. The lessors of a coal vein are liable as co-trespassers for the act of their tenant in mining coal in the land of an adjoining owner. *Dundas vs. Muhlenberg*, 35 Pa., 351. 2. A lessor of a coal mine is not liable for injuries to a house on the surface, occasioned by the working of the mine by his tenant. *Respondeat superior* is inapplicable to an owner of land for acts of negligence in a business not conducted by him and for his account. *Offerman vs. Starr*, 2 Pa., 394.

XIX. NEGLECT OF MINE BOSS. 1. A mine boss is the fellow-servant of the miner, and where an operator of a coal mine has used reasonable care in the selection of such boss, he is not responsible to a miner for injury to him resulting from the negligence of the mine boss. In the present case, a mine boss negligently omitted to close openings into another mine, which was foul with dangerous gases. The defendant operator was not warned that the openings in question had not been closed. *Haley vs. Keim*, 151 Pa., 117. *Delaware & Hudson*

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Canal Co., vs. Carroll, 89 Pa., 374. 2. A mining boss has no discretion in the performance of the duties imposed on him by the mine ventilation law. He cannot delegate such duties to another. He should see to it that doors should be provided in different portions of the mine, and that they be hung so as to remain closed. *Comm. vs. Reynolds*, 9 Luzerne Register, 259. *Reese vs. Biddle*, 112 Pa., 72. *Waddell vs. Simonson*, *Idem*, 567.

XX. NEGLIGENCE ON THE PART OF MINER. 1. Injuries received by a coal miner having been caused proximately by his own negligence, his right of action against the mine owner therefor is not supported by proof of the defendant's violation of the provisions of the mining act of June 30, 1885, when the violation in no way caused or contributed to the injuries. *Christner vs. Coal Co.*, 146 Pa., 67. 2. Where a miner, familiar with the openings of a mine, in attempting to brake a car, slipped upon a piece of slate and was run over by the car, it was held that he could not recover from his employer, who had not been proven guilty of negligence. *Massey vs. Snowden*, 149 Pa., 410. 3. Where a miner, in walking along the ordinary track leading from the colliery to his dwelling, perceived steam issuing from a hole over a wooden box, where a blow-pipe terminated, and ignoring the announced danger, advanced and fell into the excavation occasioned by the escaping steam, he was guilty of contributory negligence. *Payne vs. Reese*, 100 Pa., 301. 4. A lad of eighteen, who had been a miner for several years, was warned not to enter a dangerous portion of the mine where the mine boss had ordered him to work. He, however, obeyed the boss, and was killed by the roof falling on him. In an action brought by his parents against the owner of the mine, held, that his contributory negligence precluded a recovery for damages. *Russell vs. Hutchinson*, 15 W. N., 482.

XXI. NEGLIGENCE OF SIGNALS. In an action to recover damages for the death of a miner from the blow of a box descending the shaft at the base of which he was working, evidence was given of the neglect of a boy under fourteen

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years of age to give the signal that the box was descending. Held, that the owner of the mine was not guilty of negligence in employing a boy to give the signal, as such act required neither skill nor judgment, and that the deceased was guilty of contributory negligence, who, knowing that the box would shortly descend, carelessly continued his work at the base of the chute. *Rickert vs. Stephens*, 133 Pa., 538.

XXII. NEGLECT ON THE PART OF TENANT FOR LIFE. The rule is well settled that it is not waste in a tenant for life, to work open mines. When not precluded by restraining words, he may work them to exhaustion. *Westmoreland Coal Co.'s Appeal*, 85 Pa., 346.

XXIII. NEGLECT ON THE PART OF TRESPASSERS. Where damage in a mine to an employee resulted from the act of trespassers in removing brakes from coal cars, of which fact the owners of the mine and their agents had no knowledge, clearly such owners cannot be held liable. They are not liable for the intervening knowledge of a third party. *Ebright vs. Mineral R. R. Co.*, 2 Monaghan, 126.

XXIV. NEGLECT TO CHECK THE FLOW OF WATER IN OTHER MINES. The owner of a mine is not liable for the collection and flow by ordinary mining of subterranean water upon lower mines. He would be liable, however, for such mining as would introduce foreign water from the surface, by reason of the roof falling in. *Horner vs. Watson*, 79 Pa., 242.

XXV. NEGLECT TO FENCE OFF MACHINERY. Under the act of March 3, 1870, all machinery in or about mines where boys work, must be properly "fenced off," which means protected. A lad of thirteen years was employed as a slate picker in a coal breaker. In carrying an oil can to another employee, he fell through an opening into a pair of rollers and was severely injured. This opening was usually covered by a plank which was displaced at the time of the accident, and was so often before with the knowledge of the boy. Held, that in providing a cover for the rollers, the employer did his whole duty, and if the cover was unnecessarily removed without the

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fault or knowledge of the employer, through the negligence of one of his employees, there could be no recovery. Held, further, that the conduct of the boy presented a case of contributory negligence. *Honor vs. Albrighton*, 93 Pa., 475.

XXVI. NEGLIGENCE TO PROTECT WORKMEN. 1. Under the mine law of June 30, 1855, if, by reason of noxious gases, or of any cause whatever, an anthracite coal mine has become dangerous, it is the duty of the mine foreman to compel every workman to retire from the mine, and to remain out until a proper examination is made. Failure to do this is negligence. *Comm. vs. Coonrad*, 14 Luzerne Register, 311. 2. A mining boss under the act of April 28, 1877, is a fellow-servant with the miner, for whose negligence his employer is not liable. The operator of a coal mine fulfils the measure of his duty to his employees if he commits his work to careful and skillful bosses and superintendents who conduct the same to the best of their ability. *Redstone Coke Co. vs. Roby*, 115 Pa., 364.

XXVII. NEGLIGENCE TO PROTECT YOUNG EMPLOYEES. A delicate boy of fourteen was employed at the breaker of a mine as a slate-picker. Against his will, he was ordered to drive a dump-car, in which employment he had no experience or instruction. This post was highly dangerous, and the appliance, from the use of which an injury to the boy arose, was only in partial use; a perfectly simple device, practically removed from danger, being in extensive use for the same purpose. Held, that the case was for the jury. *Kehler vs. Schwenk*, 151 Pa., 505. 2. In an action against a mine-owner by a father to recover damages for the death of his son, a boy of fourteen, it is proper to submit the question of the father's contributory negligence to the jury in allowing his son to work in a dangerous position in the mine, without using any precautions to protect him from danger. *Weaver vs. Iselin*, 161 Pa., 386.

XXVIII. NEGLIGENCE TO REMOVE ORE. Where a mining contract permitted the mining of ore sufficient to supply a furnace, it would apply to a furnace with all the modern

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improvements, even though it used much more iron than a furnace in use when the contract was made. If the defendants omitted to take the ore to which they were entitled in any one year, they could not take the quantity thus omitted in any succeeding year. *Alden's Appeal*, 93 Pa., 182.

XXIX. NEGLECT TO SUPPORT ROOF. 1. The operator of a mine is required to cut props into proper lengths, and to deliver them into the chambers of the men who are employed in the mines, leaving it only with the men to set them up. The law requires a man who needs props to give notice a day in advance, stating the length of the props required. *Comm. vs. Richmond*, 2 C. P. Reporter, 191. 2. Where a mining boss fails to have a proper supply of props on hand to prevent injuries to miners by the falling of the roofs or walls of mines, as required by the act of April 18, 1877, and in consequence an injury is occasioned to a miner, the mining boss is deemed a fellow-servant of the party injured, and the latter cannot therefore recover damages from the owner and operator of the mine for the negligence of the mine boss. *Fairview Coal Co. vs. Biddle*, 18 W. N., 108. 3. In an action against a mine owner to recover damages for personal injuries by the fall of a large piece of coal from the roof of a gangway, it is proper to submit the case to the jury on the question whether the defendant had used proper precautions to make safe the roof of the mine. *Vanesse vs. Coal Co.*, 159 Pa., 403.

XXX. NEGLECT TO SUPPORT SURFACE. 1. Support to the surface is part of the estate reserved to the grantor of mining property, and is of common right. The destruction of a spring, occasioned by the falling in of the surface for want of sufficient support is remediable in damages, without reference to the question of negligence in the mining operations. *Barnes vs. Berwind*, 3 Pennypacker, 140. 2. The right of a landowner to surface support does not pass to the grantee of mining rights, unless expressly conveyed; it is part of the reserved estate and will pass with a subsequent conveyance of the fee. The grantee of a right to mine coal must afford sufficient sup-

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port to the overlying land, and is liable for his failure to do so, even in the absence of actual negligence. *Berwind vs. Barnes*, 13 W. N., 541. *Lawrence's Appeal*, 2 W. N., 4. *Sheaffer's Appeal*, 100 Pa., 379. *Hill vs. Pardee*, 143 Pa., 98.

3. Where land is injured by mining coal underneath it, the owner is entitled to a verdict for such damages, as the jury believe from the evidence he has thereby sustained. *Brown vs. Torrence*, 88 Pa., 186.

4. Of natural right, the surface land is entitled to support from the strata below. When the owner of the fee grants the minerals, reserving the surface, the grantee is entitled to so much of the minerals as he can get without injury to the surface. The loss of springs to the owner of the surface by reason of the ordinary working of the mines, does not render the owner of the minerals liable for damages. *Coleman vs. Chadwick*, 80 Pa., 81.

5. Corporations appropriating land under the right of eminent domain, may insist on the right of subjacent support from underlying coal strata, with all its incidents; and it matters not whether the surface and the underlying coal are owned by the same or by different persons. *Davis vs. Gas Co.*, 147 Pa., 130. *Wallace vs. Gas Co., Idem*, 205.

6. Mining property is servient to the surface to the extent of sufficient supports to sustain it, and on default the owners and workers are liable for damages. *Jones vs. Wagner*, 66 Pa., 430. *Carlin vs. Chappel*, 101 Pa., 348.

7. A lessor of coal, who directs the taking of coal from the supports and pillars of the mine, in consequence of which directions the mine caves in, is liable to the owner of the surface for the resulting injury. *Kistler vs. Thompson*, 158 Pa., 139.

8. An injunction will be granted against a mining company restraining it from removing the surface support of an adjacent railroad. *Lawrence's Appeal*, 2 W. N., 4.

9. Where the owner of land superintends the mining of coal by the tenant, he is liable for repairs to the highway rendered necessary by a cave-in, caused by the mining. *Little Schuylkill Nav. Co. vs. Tamaqua*, 1 Walker, 468.

10. The lessor of a coal mine is not liable for injuries to a

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house on the surface caused by the working of a mine by a tenant. *Offerman vs. Starr*, 2 Pa., 394. *McCullough vs. Hemingway*, 14 W. N., 16. 11. Where a railroad company has the right of way over mining lands, and covenants with the owner thereof that upon notice it will change its location, or permit the coal underneath its tracks to be mined, a tenant of such owner may sue in the name of the landlord for breach of such covenant. *Mine Hill R. R. vs. Lippincott*, 86 Pa., 468. 12. An entry upon land by the right of eminent domain, confers a right to the surface supported by the adjacent strata. The grantee of the commonwealth may insist on the full measure of support which the law gives him. He must pay for what he takes, but need not take and pay for what he does not require. *McGregor vs. Gas Co.*, 139 Pa., 237. 13. While a release from the owner of surface land, exempting the owners of underlying minerals from the obligations of surface support will be binding on all persons taking title from the releasors, the state, or its grantee, entering upon the surface under the power of eminent domain, will not be bound or restricted thereby. *Penn Gas Coal Co. vs. Gas Co.*, 131 Pa., 522. 14. Where one grants the surface of land and reserves the mines beneath, the implied right of support to the surface which passes with said grant may be excepted therefrom by express words, and in such case the grantor may mine all the coal, even though by said mining the surface should fall in. *Scranton vs. Phillips*, 94 Pa., 15. 15. It is settled law in this state, that where one person owns the surface and another person owns the coal or other minerals lying underneath, the mineral estate owes a servitude of sufficient support to the upper estate. Like any other right, the owner of the surface may part with the right to support, by his deed or covenant. *Williams vs. Hay*, 120 Pa., 495.

XXXI. NEGLECT TO VACATE. Under the mine law of June 30, 1885, if, by reason of noxious gases, or of any cause whatever, an anthracite coal mine has become dangerous, it is the duty of the mine foreman to compel every workman to

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retire from the mine and remain out until the mine has been properly examined. Failure to do this is negligence. *Comm. vs. Conrad*, 3 Kulp, 381.

XXXII. NEGLECT TO VENTILATE. 1. Under the mine ventilation law of March 3, 1870, a radical change was effected in the ventilation of coal mines, to secure the safety of miners. The statute imposes certain duties in this connection upon the foreman or mining boss, in performing which he has no discretion, nor can he delegate his duties to another. If he fails to perform such duties, he is guilty of negligence, even though no accident occurs. *Comm. vs. Reynolds*, 1 Kulp, 218. 2. A coal mine operated through a tunnel, and having no second outlet connected with it, is not within the prohibition of the mine ventilation law. *Comm. vs. Connell*, 2 Luzerne Register, 1. 3. If it appears that a mine is being operated in contravention of the mine ventilation act of March 3, 1870, it is the duty of the court to restrain so much of its operation as is illegal. *Comm. vs. Haddock*, 10 Luzerne Register, 81. 4. It is the duty of a mine foreman to see that the ventilation required by the act of June 30, 1855, is furnished. The duty cannot be delegated even to the workmen in the mines. *Comm. vs. Hutchinson*, 4 Pa. County, 18. 5. The mine ventilation act of March 3, 1870, does not require that a mine be kept clear of gas, for this is impossible, but, as fast as it is evolved, it should be diluted and expelled by the introduction of pure air. *Comm. vs. Tompkins*, 1 Luzerne Register, 341. 6. The act of March 3, 1870, known as the mine ventilation act, does not relieve a party seeking to recover compensation for injuries, from the operation of the rule relative to contributory negligence. *Honor vs. Roberts*, 5 Luzerne Register, 9. 7. The act of March 3, 1870, provides, that in every mine or colliery an adequate amount of ventilation shall be provided of not less than fifty-five cubic feet per second of pure air for every fifty men at work in such mine. Where in a mine, the revolving fan was slowed down by orders of the mine boss, through whose negligence in so doing a driver boss lost his life, held

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the owner of the mine was not responsible in damages, as a master is not responsible to a servant for an injury caused by his fellow-servant, even if the employees are not at the time engaged in the same particular work. *Lehigh Valley Coal Co. vs. Jones*, 86 Pa., 432.

XXXIII. NEGLECT TO WORK THE MINE. 1. Where the right to mine ore or other minerals is granted, reserving royalty to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income contemplated in the agreement. Such covenant will not usually be enforced in a court of equity, as an adequate remedy is afforded by an action at law for damages. *Koch's Appeal*, 93 Pa., 434. 2. Where the lease of mining property contained a covenant of forfeiture when the lessee should fail to work it for a space of three successive months, held, that the doing of any work necessary for the proper use of the mine, such as the removal of earth, water, ice or snow, would be working the mine and prevent forfeiture of the lease. *Miller vs. Slate Co.*, 129 Pa., 81.

Minors. See "CHILDREN," "INFANTS," "GUARDIANS."

I. NEGLECT IN REPRESENTATIONS OF AGE. Where a minor obtains the property of another by pretending to be of full age and legally responsible, when in fact he is not, he is guilty of fraud by false pretence, for which he is answerable under the criminal law. The vendor may affirm the contract and sue in *assumpsit*, or disaffirm the sale and bring replevin to recover the possession of his property from a third person to whom such minor may have transferred it. After the vendor has established the fraud of the minor, the burden is on such third party to prove the fairness and good faith of the transfer to him. *Neff vs. Landis*, 110 Pa., 204.

II. NEGLECT TO APPOINT GUARDIAN. In an action of partition, an infant can appear only by guardian; an appearance for an infant by his mother as next friend is irregular. Where

Minors—Continued.

service in partition has been made by notice to the next of kin of an infant under fourteen, or to the minor, if over fourteen, no further proceedings can be had until the plaintiff has applied for the appointment of a guardian for him. *Swain vs. Fidelity Co.*, 54 Pa., 455. *Moore vs. McEwen*, 5 S. & R., 273.

III. NEGLIGENCE TO CHOOSE GUARDIAN. The orphans' court has no right to appoint a guardian for any minor who is over the age of fourteen, unless the minor is incompetent to exercise his right of choice. *Arthur's Appeal*, 1 Grant, 55.

IV. NEGLIGENCE TO FULFIL CONTRACT. In a contract between a minor and an adult, the adult is bound, although the minor may not be. *Titman vs. Titman*, 64 Pa., 480.

V. NEGLIGENCE TO PROTECT. 1. A minor may contract for his own benefit, and this power is limited to his necessities and advantages; his contracts cannot enure to the benefit of another. A minor, having no father, but living with his mother, and by his labor contributing to her support, was a passenger on a railway car and paid his fare. He was injured by the negligence of the company's servants, nursed and supported by his mother. Held, that the contract to carry safely was with the minor; that the mother was a stranger to it, and she could not recover for the injury. *Fairmount Railway vs. Stutler*, 54 Pa., 375. 2. Under the common law, a mother would have no right of action for injury received by a minor child, but under our act of April 26, 1855, both parents may recover damages where the injury caused the child's death. Under this act, nothing short of the minor child's death will give the mother the right of action. His maiming will not suffice. For the discrepancy of these rules, the court is not responsible. *Penna. R. R. vs. Bantom*, 54 Pa., 497.

VI. NEGLIGENCE, RESULTING IN LOSS. An infant, who hires a horse to go to one place, and goes elsewhere, killing the animal by severe usage, may plead his infancy in bar of an action on the case for damages. *Penrose vs. Curren*, 3 R., 351.

Mistakes.

I. NEGLECT AS TO DATE. A mistake in laying the cause of action to have accrued on a day subsequent to the commencement of the suit, is cured by a verdict on the merits. *Kraft vs. Gilchrist*, 31 Pa., 470.

II. NEGLECT IN CORRECTING. It is bad practice to correct some mistakes by an order *nunc pro tunc*. *Wisener vs. Myers*, 42 Pittsburg Journal, 167.

III. NEGLECT IN MAKING. 1. One who, in a sudden emergency, acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence. Such act of omission, if faulty, may be called a mistake, but not carelessness. *Brown vs. French*, 104 Pa., 604. 2. A mistake exists, when a person under some erroneous conviction of law or facts, does or omits to do some act. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. The rule now is, that a mistake as to the general law is irremediable in equity, but that a mistake as to individual rights may, under certain circumstances, be reversed. Also, that where ignorance of the law exists on one side, and is known and taken advantage of by the other party, the former will be relieved. The general rule is that a mistake will not be relieved against, if it be the result of a party's own negligence, but a reasonable diligence is all that is required. *Nulton's Appeal*, 103 Pa., 291.

IV. NEGLECT IN MODE OF PROCEDURE. Mere irregularities or errors in the proceedings are not necessarily fatal to the action. They are usually corrected by the court below, while the proceeding is pending there ; and if they are not, they may be corrected in the appellate court. *Roadin vs. Kiskiminitas Township*, 32 Pa., 9.

V. NEGLECT IN PAYMENT OF MONEY. Money paid by mistake cannot be recovered, unless its retention be against equity and good conscience. *City of Philadelphia vs. Cooke*, 30 Pa., 61.

VI. NEGLECT TO CORRECT. 1. The power to correct mistakes is fundamental and inherent in all tribunals. The

Mistakes—Continued.

decision may be final, while the expression may be open to correction. Courts will find some way of correcting clerical errors. *Clarion Bank vs. Brenneman*, 114 Pa., 315. 2. Mistakes in law may be corrected, notwithstanding the maxim, ignorance of law excuses no man. *Levy vs. Schlager*, 8 Luzerne Register, 129.

VII. NEGLIGENCE TO RELIEVE AGAINST. A mistake will not be relieved against if it is the result of a party's own negligence, when his condition is attributable to that want of due diligence which may fairly be expected of a reasonable person. Where the means of inquiry are equally open to both parties, if a mistake occur without fraud or falsehood, no relief can be granted on grounds of mistake alone. *Mutual Building Ass'n's Appeal*, 33 Pittsburgh Journal, 324.

VIII. NEGLIGENCE THROUGH IGNORANCE OF LAW. Justice Story states that in this country, the general rule that ignorance of law furnishes no ground of relief against a mistake, has been recognized as founded on sound wisdom and policy. Exceptions to it, if any, will be found not to rest upon the mere foundation of a naked mistake of law, nor upon mere ignorance of title founded upon such mistake. *Peters vs. Florence*, 38 Pa., 198.

Mobs.

I. NEGLIGENCE OF NOTICE OF CONTEMPLATED ATTACK. Upon knowledge of an intention to attack or destroy his property, it is the duty of a person or his agent, if sufficient time intervenes, to give written notice to the proper official. The measure of damages is the value of the property destroyed, with interest from the time of its destruction. Exemplary or vindictive damages cannot be given as an action against the county. The law does not require, in an action brought against the county for damages, suffered by the violence of a mob, to prove every article destroyed. *Hermits of St. Augustine vs. County*, Brightly's Rep., 116. *St. Michael's Church vs. County*, *Idem*, 121.

Mobs—Continued.

II. NEGLECT TO CONTROL. 1. The acts of May 31, 1841, and of March 20, 1849, make the cities of Philadelphia and Pittsburg liable for property destroyed by a mob, and the fact that the county authorities are unable to quell a riot, does not limit the liability of the county for damages. *Allegheny vs. Gibson*, 90 Pa., 397. 2. By statutes referring to Philadelphia and Allegheny counties, where property is destroyed by a mob, the owner of such property may recover damages from the county for the destruction thereof. Damages will not be given for consequential injuries, such as the suppression of business. Nor will interest be allowed on the estimated loss. *Weir vs. Allegheny*, 95 Pa., 413.

III. NEGLECT TO SUPPRESS. Where property in the custody of a common carrier, without fault or negligence of the carrier, is destroyed or stolen by a mob, the carrier is not liable. *Sherman vs. R. R.*, 8 W. N., 269.

Mortgage.

I. NEGLECT BY RETAINING CHATTELS. Chattel mortgages and sales which leave the property in the possession of the debtor, are against policy and void against execution creditors. *Roberts' Appeal*, 60 Pa., 403.

II. NEGLECT IN ACKNOWLEDGMENT. 1. Where a justice of the peace of one county inadvertently specified another county of the state as the place where a mortgage was acknowledged, in a *scire facias* against the terre-tenant, evidence is admissible to show that the mortgage had been acknowledged in the proper county. The acknowledgment was *prima facie* regular, and the recorder was bound to record it; it was therefore notice to subsequent purchasers. *Angier vs. Schiefflin*, 72 Pa., 106. 2. Where the wife's acknowledgment to a mortgage is defective, the mortgage does not bind the wife. The certificate of acknowledgment must be in accordance with the act of assembly. *McGeary's Appeal*, 72 Pa., 365. 3. While it is true that the mortgage of a married woman is invalid unless separately acknowledged by her, yet if

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judgment be recovered on a *scire facias*, issued on such mortgage, the judgment is conclusive that the mortgage was properly executed, and the validity thereof cannot be questioned in a collateral action of ejectment. *Michaelis vs. Brawley*, 109 Pa., 7. 4. Where, in the mortgage of a married woman's separate estate, the alderman falsely certified to the separate examination and acknowledgment of the wife, who did not appear before him, the mortgagee will be affected by the fraud, though not present at the time nor informed of the fact. He will not be presumed a *bona fide* purchaser, and acquires neither a legal nor equitable estate in the premises mortgaged. He is simply a lien creditor, a holder of securities for money. His assignee takes the mortgage subject to all defences, unless he inquires of the mortgagor and learns that there are none. *Michener vs. Cavender*, 38 Pa., 334. 5. In order that a deed or mortgage may become efficacious, it must be acknowledged by the grantor before a competent officer, who must certify such acknowledgment with the day and year, when the same was made, and by whom. *Myers vs. Boyd*, 96 Pa., 427. 6. An auditor in distributing a fund may disregard a mortgage defectively acknowledged. *Osterhout vs. Gernon*, 5 Luzerne Law Times, N. S., 31. 7. A certificate of acknowledgment of a married woman, which fails to show that the mortgage was read or otherwise made known to her, is fatally defective. *Spencer vs. Reese*, 165 Pa., 158.

III. NEGLECT IN ASSIGNMENT. 1. Where one purchases at sheriff's sale a property subject to a mortgage, and subsequently pays off the mortgage, it is an extinguishment of the debt, and he cannot take an assignment of it and enforce it by a suit on the bond against the mortgagor. *Dollar Savings Bank vs. Burns*, 87 Pa., 491. 2. Where the assignment of a mortgage was neither under seal, nor in the presence of witnesses, nor acknowledged and recorded, the *scire facias* is properly issued in the name of the holder of the legal title for the use of the assignee. *Partridge vs. Partridge*, 38 Pa., 78. 3. It appears that the assignee of a mortgage is protected from

Mortgage—Continued.

secret equities of all others than the mortgagor. Where one of two innocent persons must suffer, he must bear the loss whose act or neglect has occasioned the suffering. *Wethrill's Appeal*, 3 Grant, 281.

IV. NEGLECT IN DATE. A debtor may prefer a creditor by giving him a mortgage; and the ante-dating such mortgage, though improper, cannot affect a creditor not privy to it. On a sale of land by prior judgment creditors, a mortgagee is entitled to the residue of the proceeds of sale remaining after paying such judgments. *Lindle vs. Neville*, 13 S. & R., 227.

V. NEGLECT IN DESCRIPTION OF PREMISES. Where, by a clerical error, a slight misdescription of the premises existed in a mortgage, which error was known to a subsequent judgment creditor when his judgment was entered, held, that such creditor was bound by such notice. *Cake vs. Cake*, 127 Pa., 400.

VI. NEGLECT IN DURATION. Where a mortgage was given with the express understanding that it should be drawn for three years from date, whereas it was drawn for one year only, the mortgagee agreeing that it should run for three years, and not be enforced until that time expired, evidence of such parol contemporaneous agreement should have been admitted; for where equity would reform or set aside a written instrument for fraud, accident or mistake, parol evidence is admissible, except in the case of commercial paper, to contradict or deny the terms of a written agreement. *Lippincott vs. Whitman*, 83 Pa., 244.

VII. NEGLECT IN EXECUTING. Where a husband gives a mortgage upon his property and suffers judgment on the same with intent to defraud his wife of her dower, and the mortgagees have constructive notice of her rights, she has a strong equity to be allowed to intervene to have judgment opened. *McClurg vs. Schwartz*, 87 Pa., 521.

VIII. NEGLECT IN MARKING SATISFIED. As between the original parties, it is competent to show that a satisfaction of a mortgage was by mistake. *Reichard vs. Hutchins*, 5 Kulp, 274.

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IX. NEGLIGENCE IN OBTAINING. Where a mortgagor, at the time that he executes a mortgage, delivers to the mortgagee a writing, certifying that he had no defence, he cannot set up, as against a purchaser of the mortgage, that there was fraud in obtaining the mortgage. *Hutchinson vs. Gill*, 91 Pa., 253.

X. NEGLIGENCE IN NAME OF MORTGAGOR. A mistake in writing the name of the mortgagor, will not deprive the mortgagee of his rights to recover whatever interest the mortgagor had. *Wilson vs. Jones*, 6 W. N., 157.

XI. NEGLIGENCE IN PARTIES TO SUIT. Upon a return of *mortuus est* as to the mortgagor, judgment should be postponed until the personal representatives are brought in. *Blanchard vs. Koller*, 5 W. N., 362.

XII. NEGLIGENCE IN PURCHASING. One of several tenants in common cannot purchase a mortgage upon the land held in common, and set it up against his co-tenants for the purpose of depriving them of their interest, and a sheriff's sale on such mortgage will be restrained by injunction. *Fisher vs. Hartman*, 165 Pa., 16.

XIII. NEGLIGENCE IN RECORDING. The omission of part of an instrument in recording it, if it be a material part, necessary to identify the subject-matter, will reduce the whole instrument to the condition of an unrecorded mortgage. *Tryon vs. Munson*, 77 Pa., 250.

XIV. NEGLIGENCE IN RECORD OF FORECLOSURE. An irregularity in proceedings in a *scire facias* on a mortgage, as a judgment on a return of one *nihil*, cannot affect the competency of the judgment, or a sheriff's sale upon it, when offered in evidence in another suit. *Allison vs. Rankin*, 7 S. & R., 269.

XV. NEGLIGENCE IN SATISFYING. 1. An administrator entered satisfaction of a mortgage on the margin of a record which his decedent had not owned, the record at the time showing plainly a reference to the record of the assignment of a mortgage which his decedent did own. More than six years afterwards, one, who relying upon a clear search, had purchased the property encumbered by the mortgage thus marked satis-

Mortgage—Continued.

fied and the mortgage being enforced, he lost the amount thereof, filed a bill in equity against the administrator to recover compensation. Held, that as the record indicated precisely what mortgage the latter intended to satisfy, fraud, actual or constructive, could not be presumed, or more than a mere mistake, and the plaintiff's remedy was barred by limitation. *Binney vs. Brown*, 116 Pa., 169. 2. Satisfaction of record of a mortgage by one without authority, by a mistake, whereby an innocent *bona fide* purchaser of the premises is damnified, is such an illegal, fraudulent act as to prevent the running of the statute of limitations, until the discovery of the act by the party injured. *Brown vs. Binney*, 17 W. N., 401. *Brown vs. Henry*, 106 Pa., 262. 3. Where a judgment was obtained on bond accompanying a mortgage and assigned on record to a third party, the subsequent fraudulent entry of satisfaction of the mortgage by the mortgagee did not abridge or impair the lien of the judgment. A subsequent mortgagee could derive no benefit from the act, but his lien would be still subordinate to the prior lien of the judgment. The entry of satisfaction was a nullity, so far as it respects the assignee of the judgment and the subsequent mortgagee. *DeWitt's Appeal*, 76 Pa., 283. 4. The neglect to include the stipulated attorney's commission in the judgment on the mortgage and the subsequent satisfaction of such judgment is fatal to the claim. *Faulkner vs. Wilson*, 3 W. N., 339. 5. The entry of satisfaction on a mortgage by an attorney upon a forged power, although duly attested by the recorder, does not discharge the lien. *Lancaster vs. Smith*, 3 Lancaster Bar, No. 44. 6. An entry of satisfaction of a mortgage by the recorder on a certificate from the court that the judgment thereon had been satisfied, does not discharge the lien of the mortgage, where the judgment had not been satisfied by the assignees of record of the mortgagee, but by the plaintiff in the judgment, who was the original mortgagee. *Leech vs. Bonsall*, 9 Phila., 204. 7. Satisfaction having been entered of record by a mortgagee when in an enfeebled mental condition, for a

Mortgage—Continued.

grossly inadequate consideration, the mortgagor, who was her confidential adviser and agent, and became the executor of her will, is chargeable with the amount of such mortgage in the settlement of his account. *Pittock's Estate*, 9 Pa. County, 457. 38 Pittsburg Journal, 310. 8. There is no virtue in the satisfaction of a mortgage, except perhaps as to purchasers or other mortgagees without notice, that prevents either a fraud or mistake in the satisfaction from being corrected. Where the entry of satisfaction is shown to have been entered by mistake, it is not conclusive as between the parties to the transaction. *West's Appeal*, 88 Pa., 341. *Callahan's Appeal*, 124 Pa., 138. *Lancaster vs. Smith*, 67 Pa., 427.

XVI. NEGLIGENCE IN SCIRE FACIAS. 1. Where properties have been omitted by mistake, the court will allow the record to be amended. *Potter vs. Grambo*, 1 W. N., 484. 2. A *scire facias* on a mortgage takes the place of a declaration and should show on its face an immediate cause of action. *Swift vs. Allegheny Building Ass'n*, 82 Pa., 142.

XVII. NEGLIGENCE IN SUIT UPON. The assignee of a mortgage may sue upon the mortgage in his own name, and if he sues as assignee the words are mere surplusage. *Strawn vs. Shunk*, 110 Pa., 259.

XVIII. NEGLIGENCE IN TAKING PROPERTY UNDER AND SUBJECT TO MORTGAGE. 1. Where a deed recites that the grantee takes "under and subject" to a mortgage debt, and there was no agreement to pay or assume said debt, and no consideration moved to him for its payment, he is merely a dry trustee and not personally liable for the mortgage debt. *Girard Life Ins. Co. vs. Stewart*, 86 Pa., 89. 2. Where one takes a conveyance of land "under and subject to" the payment of a mortgage, he covenants to pay off the mortgage debt, and cannot relieve himself of this liability by conveying the land to another person. *Peyton vs. Samuel*, 24 Pittsburg Journal, 138.

XIX. NEGLIGENCE OF ASSIGNEE. 1. The assignee of a mortgage, unless the mortgagor has estopped himself, holds it subject to all the equities of the assignor. The mortgagor

Mortgage—Continued.

having given a certificate of no set-off, is estopped from setting up a defence against the assignee. *Ashton's Appeal*, 73 Pa., 153. 2. The assignee of a mortgage, who does not inquire of the mortgagor whether he has any defence, takes subject to the equities of the mortgagor against the mortgagee. *Earnest vs. Hoskins*, 100 Pa., 551. 3. Actual notice of the assignment of a mortgage is essential to the completion of the contract relation between the assignee and the mortgagor, and until such notice is given, the mortgagor does no wrong in making payment to the mortgagee. *Foster vs. Carson*, 159 Pa., 477. 4. The assignee of a mortgage, though allowed to sue in his own name as assignee, takes it subject to all the equities in favor of the mortgagor, existing at the time of the assignment. Any previous payment made to the mortgagee by the mortgagor shall avail him as payment against an assignee who has neither inquired of the mortgagor about the state of his indebtedness, nor given him notice of the transfer. *Horstman vs. Gerker*, 49 Pa., 282. 5. The purchaser of a mortgage is bound to make inquiry of the mortgagor before purchasing, and is chargeable with notice of any defence by way of payment or growing out of the equities of the parties to the instrument which inquiry would have brought to his notice. *Morgan's Appeal*, 126 Pa., 500. 6. The assignee of a mortgage takes it subject to all the equities between the original parties, but not to any secret equities not arising out of the instrument. If the mortgagor himself negotiates the sale of a mortgage, it should put the purchaser upon inquiry. *Mullison's Estate*, 68 Pa., 212. 7. The assignee of a mortgage takes the same subject to all equities between the mortgagor and mortgagee, but not subject to the equities between the mortgagor and a prior assignee of the mortgage. *Reine-man vs. Robb*, 98 Pa., 474. 8. The assignee of a specialty takes it subject to the equities of the obligor. An assignee of a mortgage, without taking a declaration of no set-off, or making inquiries of the mortgagor, as to conditions in the way of payment, takes the mortgage subject to any equities between

Mortgage—Continued.

the parties. *Theyken vs. Machine Co.*, 109 Pa., 95. 9. An assignee of a mortgage takes it subject to all defences, unless he ascertains from the mortgagor that there are none. Although an assignment under seal imports a consideration, the assignee must prove it if there be even slight evidence to impeach the transaction. *Twitchell vs. McMurtrie*, 77 Pa., 383.

XX. NEGLECT OF CHANGE OF POSSESSION. As a rule, a mortgage of personal property, like a sale, is void as against creditors if a corresponding change of possession does not accompany the same. But where a removal of the property is impracticable, when all has been done that reasonably can be to mark the change of ownership and possession, the law is satisfied. *Bismarck Ass'n vs. Bolster*, 92 Pa., 123.

XXI. NEGLECT OF CONSIDERATION. 1. It is the duty of a party purchasing a mortgage to inquire of the mortgagor whether any money is due upon it, unless he receives a declaration of no set-off. *Clark vs. Gibson*, 10 W. N., 522. 2. A mortgage made with intent to defraud the mortgagor's creditors is, nevertheless, good as between the parties to it; though void as to those whom it was intended to defraud. *Gill vs. Henry*, 95 Pa., 388. *Bonesteel vs. Sullivan*, 104 Pa., 9. 3. The fact that a mortgage was given for a greater sum than was due, will not avoid it, unless it was done with fraudulent intent. *Irwin vs. Tabb*, 17 S. & R., 319. *Gordon vs. Preston*, 1 W., 388. 4. Where a mortgagor executed a mortgage without consideration, recorded it, but retained it in his possession, and subsequently had the mortgagee assign it for value, a later purchaser from him of the property mortgaged is bound by the constructive knowledge of the existence of the mortgage which the record afforded. *Johnson vs. McCurdy*, 83 Pa., 282. 5. A mortgage or judgment may be given to secure a creditor, not only for a debt due, but for responsibilities, which are contingent, nay, for future advances. The power of sale does not vary the case; it creates no trust for creditors. *Stewart vs. Stocker*, 1 W., 140. *Parmentier vs. Gillespie*, 9 Pa., 86. *Taylor vs. Cornelius*, 60 Pa., 195. 6. A married

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woman who executed and properly acknowledged jointly with her husband a mortgage upon her separate real estate, cannot defeat the suit of the mortgagee thereupon by alleging that she never received the consideration; it is sufficient if her husband received it. *Wentz vs. Acher*, 2 Montgomery Co., 91.

XXII. NEGLECT OF INQUIRY OF TITLE. The actual, visible possession of land is constructive notice to purchasers or mortgagees of the occupant's title, unless he has put on record a title inconsistent with his possession. A mortgagee or purchaser of land which is in the possession of an occupant other than the holder or grantor of the recorded title, is bound to inquire of the occupant as to the title under which he is in possession. A mortgagee who omits to make such inquiry, is affected with constructive notice of an existing resulting trust in favor of the person in possession. *Rowe vs. Ream*, 105 Pa., 543.

XXIII. NEGLECT OF JUNIOR ENCUMBRANCER. It is the duty of a junior encumbrancer, if he intends to claim an equity through the prior encumbrance, to give the holder notice. *McIlvain vs. Mutual Co.*, 93 Pa., 30.

XXIV. NEGLECT OF NOTICE OF EXECUTION. Where, after service on the mortgagor, and judgment obtained on the mortgage, the mortgagor dies, it is not necessary to warn his personal representatives by *scire facias* before proceeding to execution. *Hunsecker vs. Thomas*, 89 Pa., 154.

XXV. NEGLECT OF PURCHASER OF PROPERTY. The purchase of mortgaged real estate entails no individual liability upon the purchaser of such premises, without a voluntary agreement on the part of such purchaser to that effect. *Allentown Bank's Appeal*, 17 Phila., 568.

XXVI. NEGLECT OF PURCHASER OF LAND SUBJECT TO.
1. The personal liability of a vendee of land "under and subject" to a mortgage may be avoided by an agreement between the vendor and vendee, that the vendee shall not assume personal liability. Parol evidence of such agreement is admis-

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sible. One who takes "under and subject" to a mortgage makes the debt his own, and cannot relieve himself of this personal liability by conveying the land to another. *Girard Life Ins. Co. vs. Addicks*, 5 W. N., 75. *Morris vs. Guier*, *Idem*, 132. *Hirst's Appeal*, 92 Pa., 491. *Seeger's Estate*, 6 W. N., 369. *Stokes vs. Williams*, *Idem*, 473. *Taylor vs. Magee*, 92 Pa., 491. *Peyton vs. Samuel*, 4 W. N., 105. *Heritage vs. Bartlett*, 8 W. N., 26. 2. Although the clause in a deed "under and subject" to a mortgage is a covenant of indemnity only as between grantor and grantee, yet such grantee may so contract with the grantor as to make himself personally liable to the mortgagee for the amount of his mortgage. *Merriman vs. Moore*, 90 Pa., 78.

XXVII. NEGLECT TO ALLOW COMMISSIONS. 1. Where a mortgagee, who is an attorney-at-law, sues out the mortgage he is entitled to the commission for collection. *Bedell vs. McCormick*, 23 W. N., 28. 2. The five per cent. clause for expenses of collection in the mortgage is not a penalty, but an agreed compensation for expenses incurred. It is not an unreasonable amount, unless the mortgage is very large. When excessive, the court, in its discretion, may reduce it. *Moller vs. Ohse*, 5 W. N., 510. *Maitland vs. Daly*, 6 W. N., 31. *Waln vs. Massey*, 96 Pa., 87. *Rest vs. Worthington*, 9 W. N., 192. *Terry vs. Slemmer*, 17 W. N., 155.

XXVIII. NEGLECT TO DISCHARGE. Where a person takes title to land subject to two mortgages, he cannot at a subsequent sale under the first mortgage buy in the property and hold it divested of the lien of the second mortgage. *Kennedy vs. Borie*, 166 Pa., 360.

XXIX. NEGLECT TO DELIVER. Where a mortgage has not been delivered by the maker, but is surreptitiously put in circulation without his consent, it has no valid existence. *Nolan vs. King*, 4 Northampton Co., 342.

XXX. NEGLECT TO DEMAND INTEREST. Presumption of payment arises where neither the interest nor the principal of

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a mortgage has been demanded for more than twenty years. *Michener vs. Michener*, 17 W. N., 266.

XXXI. NEGLECT TO EXTINGUISH. A mortgage does not necessarily merge or become extinguished in consequence of an assignment of it being made to the owner of the mortgaged premises, if the intention of the parties be otherwise. *Wagner vs. Wenrich*, 1 Woodward's Decisions, 37.

XXXII. NEGLECT TO FORECLOSE. Where a loan is made on bond and mortgage, and judgment is entered on the bond, the mortgaged premises being primarily liable, must, if the mortgagor so elect, be exhausted before the personal property of the mortgagor can be taken in execution. *Borland vs. Elton*, 14 W. N., 563.

XXXIII. NEGLECT TO GIVE NOTICE OF ASSIGNMENT. Payment by the obligor to the obligee of a bond accompanying a mortgage extinguishes the mortgage, even in the hands of an assignee of the mortgage for a valuable consideration, who neglects to notify the obligor of the assignment before payment of the bond. *Hodgdon vs. Naglee*, 5 W. & S., 217.

XXXIV. NEGLECT TO INDEX. Actual notice to a subsequent purchaser or encumbrancer of the existence of a prior mortgage upon land, recorded but not indexed, is equivalent to the constructive notice of the index. *Speer vs. Evans*, 47 Pa., 141.

XXXV. NEGLECT TO INFORM ASSIGNEE OF AN AGREEMENT. The assignee of a mortgage is not affected by a collateral agreement between the mortgagor and mortgagee, made at the time of the execution of the mortgage, of which he has had no notice. *McMasters vs. Wilhelm*, 85 Pa., 218.

XXXVI. NEGLECT TO ORDER SATISFIED. In the absence of notice to all parties interested, the orphans' court has no power to order an administrator to enter satisfaction of a mortgage without actual receipt by him of the money. *Albertson's Estate*, 20 Phila., 82.

XXXVII. NEGLECT TO PAY. 1. A vendee of property taken expressly subject to a mortgage, makes the debt his

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own ; and if, on sale upon the mortgage, there is a deficiency which the vendor is obliged to pay on his bond, he may recover in an action against the vendee. *Burke vs. Gummey*, 49 Pa., 518. 2. In a mortgage, payable by instalments, the stipulation that the mortgagee might sue out a *scire facias* and proceed at once for the whole amount remaining unpaid in case the mortgage should be in default thirty days on any instalment, makes all unpaid instalments recoverable at that time. *Robinson vs. Loomis*, 51 Pa., 78. 3. *Scire facias* on a mortgage under the statute, is original process provided for on the default of the mortgagor, and lies on all mortgages, recorded or unrecorded. It is a local action and must issue in the county where the land lies, and two returns of *nihil* are equal to a return of *scire feci*. *Tryon vs. Munson*, 77 Pa., 250. *Taylor vs. Young*, 71 Pa., 81.

XXXVIII. NEGLECT TO PAY ATTORNEY'S COMMISSION. An attorney's commission provided for in the mortgage is collectible, although no notice was given of the intention to foreclose, where the mortgagor does not tender debt, interest and costs of maturity. *Warwick Iron Co. vs. Morton*, 7 Montgomery Co., 86.

XXXIX. NEGLECT TO PAY IN COIN. Where a mortgage is by its terms payable in coin, parol evidence of an agreement to take a fixed rate of premium is inadmissible. *Fries vs. Fox*, 2 W. N., 263. *Parish vs. Kohler*, *Idem*, 488.

XL. NEGLECT TO PAY IN SILVER. Where a mortgage is payable in lawful silver money with interest, judgment for the amount due in lawful silver money of the United States was proper. Interest is to be paid in the same coin as the principal. *McCalla vs. Ely*, 64 Pa., 254.

XLI. NEGLECT TO PAY INTEREST. 1. Where it is provided in a mortgage, that in default of the prompt payment of interest the entire sum shall become due, the only notice required of the mortgagee is the service of the writ. But where the conduct of the mortgagee clearly indicated his intention to waive the contract right, or his declarations to the mortgagor

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misled or lured him to inaction, judgment for the principal will not be given. Mere delay of suit or neglect of demand is not waiver, nor is the creditor's absence from the country, nor his concealment to avoid the receipt of the interest ground for relief. *Atkinson vs. Walton*, 162 Pa., 219. 2. Though a life tenant of real estate, subject to a mortgage of the fee, simply suffers the interest to remain unpaid, whereupon the mortgage is foreclosed, there is nothing in his default which will prevent him from becoming a purchaser of the fee at a sale upon the mortgage judgment. A life tenant owes the remainder man no duty, and is not charged with any trust. If, by his wilful neglect or default, the estate is lost, the only redress is an action for damages. *Fidelity Deposit Co. vs. Dietz*, 132 Pa., 36. 3. A verbal promise by the mortgagee to notify the mortgagor from time to time when the interest should become due, is not binding. *Gerke vs. Jacoby*, 7 W. N., 438. 4. A stipulation in a mortgage, that on default of the payment of interest, the principal shall forthwith become due and payable is not in the nature of a forfeiture or penalty, but an essential part of the contract. *Gulden vs. O'Byrne*, 7 Phila., 93. 5. It is customary to provide in a mortgage, that upon default in payment of interest, the whole debt secured by the mortgage shall become immediately liable. A defendant who offers no excuse for his neglect to pay interest, will not be favorably regarded by a court of equity. *Warwick Iron Co. vs. Morton*, 148 Pa., 72. 6. A demand of interest due upon a mortgage is not necessary prior to instituting suit under the usual thirty days' clause. Acts, however, tending to put defendant off his guard will entitle him to relief. If the interest fall due on Sunday, it may be paid on Monday. *Gaskill vs. Scheneile*, 2 W. N., 156. *McNeil vs. Amey*, *Idem*, 65. *Gerke vs. Jacoby*, 7 W. N., 438. *Hughes vs. Snyder*, 2 W. N., 65. 7. Where, by the terms of a mortgage, the principal becomes due upon default of the prompt payment of interest, a foreclosure may be made at the expiration of such period. *Taylor vs. Foulkrod*, 3 W. N., 171.

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German Building Ass'n vs. Metzger, Idem, 204. *Pancoast vs. Haas*, 1 W. N., 264.

XLII. NEGLECT TO PRODUCE IN COURT. In the trial of a *scire facias sur* mortgage, an exemplification of the record of the mortgage is as good evidence as the mortgage itself. Of course, if the original be needed by the defendant as evidence, he has the power to compel its production. *Lancaster vs. Smith*, 67 Pa., 432.

XLIII. NEGLECT TO PROPERLY REGISTER. A purchaser at sheriff's sale is not bound to notice a mortgage defectively registered. *Goepp vs. Gartiser*, 35 Pa., 130.

XLIV. NEGLECT TO RECORD. 1. A mortgage, unrecorded in the lifetime of the mortgagor, has no preference over other specialty debts out of the proceeds of the sale by the sheriff of the mortgaged premises, after the decease of the mortgagor. The moment a man dies, leaving debts, every creditor has a lien on his estate. Such debts have their various grades, fixed by the death of the debtor, and all specialty debts are to be paid equally. *Adams' Appeal*, 1 P. & W. 448. 2. A public sale under a second mortgage divests the lien of a first mortgage, where a judgment was entered against the defendant before the first mortgage was recorded. This is not the case, where a notice was given at the sale that the purchaser would take subject to the first mortgage. *Ashmead vs. McCarthur*, 67 Pa., 326. 3. A mortgage, imperfectly recorded, is ineffectual as a lien against subsequent judgment creditors. Actual notice, however, of its existence to the mortgagee of a second mortgage, at the date of its execution, would render such first mortgage good as to him. *Bank vs. Bank*, 7 W. & S., 335. 4. A mortgage given for the purchase money of real estate, executed before, but not recorded until after judgments had been entered against the mortgagor, is entitled to priority over them in the distribution of the proceeds of a sheriff's sale of the land, where the judgment creditors had actual knowledge of the mortgage before the debts were contracted for which the judgments were obtained. *Britton's*

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Appeal, 45 Pa., 172. 5. Where proof was adduced that a deed was antedated, and the purchase money mortgage simultaneously given had been recorded within sixty days from the time it was actually executed and delivered, it was held, that the lien of the mortgage was not divested, but still held the land in the hands of the purchaser. *Cake's Appeal*, 23 Pa., 186. *Parke vs. Neeley*, 90 Pa., 52. 6. A judgment and mortgage entered on the same day, are entitled to an equality of distribution. *Clawson vs. Eichbaum*, 2 Grant, 130. *Magaw vs. Garrett*, 25 Pa., 319. 7. Where a purchase-money mortgage was not recorded until after the entry of a judgment under which the property was sold, and the purchaser at the sale agreed to take the land subject to the mortgage, he is bound thereby. *Crooks vs. Douglass*, 56 Pa., 51. 8. A *bona fide* purchaser is not affected by an unrecorded mortgage of which he has not actual notice, or notice of circumstances sufficient to put him on inquiry and to lead him to the truth. This principle, however, exists only for the protection of purchasers, who invoke it. *Directors of the Poor vs. Royer*, 43 Pa., 152. 9. If purchase money be secured by two mortgages, recorded on the same day, though at different hours, and within sixty days of their date, one cannot be prior to the other, and a sheriff's sale on either divests both. *Dungan vs. American Ins. Co.*, 52 Pa., 253. 10. By act of March, 1820, a mortgage is not a lien until recorded, except that purchase money mortgages may be recorded within sixty days from their execution. *Foster's Appeal*, 3 Pa., 79. 11. An absolute deed and defeasance, made at the same time, constitute a mortgage; and if the defeasance be not recorded, it is deemed an unrecorded mortgage, and is postponed to a judgment of subsequent date, notwithstanding the deed has been recorded. *Friedley vs. Hamilton*, 17 S. & R., 70. *Jaques vs. Weeks*, 7 W., 268. *Coopman vs. Baccastow*, 84 Pa., 363. 12. Where a mortgage not for purchase money, and a judgment were entered of record on the same day, there being nothing of record to show the

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precise time of the entry of either, they are payable *pro rata*. The rule is to treat the two liens as commencing simultaneously, and if the land of the debtor is not sufficient to pay both, the loss must be divided in equal proportions. *Hendrickson's Appeal*, 24 Pa., 364. 13. An unrecorded mortgage, to secure the payment of money, is not a lien, as against a subsequent judgment. In such a case, notice of the mortgage is not material. *Hibberd vs. Bovier*, 1 Grant, 266. 14. Under the acts of April 27, 1855, and April 3, 1868, the lessee of a colliery, mining land or manufactory could mortgage his lease in the demised premises. If the mortgagee of a leasehold fails to record the lease with the mortgage, or to cause full reference to be made in the mortgage to the book and page where the lease is then recorded, the mortgage is without lien. *Hilton's Appeal*, 116 Pa., 351. 15. An unrecorded mortgage is good between the parties, and a *scire facias* may issue upon it. If the writ is defective in not reciting the provision in the mortgage, that upon the failure of any instalment of principal the whole debt secured thereby should become due, and that a *scire facias* might there upon issue, is a clerical error and amendable, even at the trial. *Hosie vs. Gray*, 71 Pa., 204. 16. Where a mortgage, though prior in point of time, is not recorded until the entering of a subsequent judgment, the lien of the judgment is preferred. As a mortgage is but a security for a debt, mortgagees should remember the maxim, *prior in tempore, portior in jure*. This preference exists, it seems, even though the judgment creditor had notice of the mortgage, before his judgment was entered. *Hulings vs. Guthrie*, 4 Pa., 123. 17. An unrecorded mortgage can take nothing as against judgments in point of law, nor is entitled to any preference in equity. If it is, it must be by bringing home to the owners of the judgments actual notice of the existence of the unrecorded mortgage, not only before their respective liens attached but before the debts in which they are founded were contracted. *Britton's Appeal*, 45 Pa., 127. *Lahr's Appeal*, 90 Pa., 507. 18. Mortgages must

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be recorded in "mortgage books," and are not properly recorded in any other species of book where they cannot be found by means of the mortgage index. There is no parol equitable mortgage of lands by the deposit of title deeds in Pennsylvania. *Luch's Appeal*, 44 Pa., 519. *Jaques vs. Weeks*, 7 W., 270. 19. Express personal notice of an unrecorded mortgage to a subsequent purchaser or mortgagee of the property, before such conveyance or second encumbrance, suffices to sustain a prior lien; otherwise not. *Levinz vs. Will*, 1 D., 435. *Burke vs. Allen*, 3 Y., 351. *Clow vs. Woods*, 5 S. & R., 275. 20. An unrecorded mortgage is good against the mortgagor himself or his alienee or mortgagee with actual notice, or a judgment creditor with notice before his debt is contracted. A *scire facias* may issue upon it. *Tryon vs. Munson*, 77 Pa., 262. *McLaughlin vs. Ihmsen*, 85 Pa., 366. 21. A first mortgagee, suffering the title deeds of the estate to remain in the hands of the mortgagor, who afterwards executes a second mortgage, shall be postponed in Great Britain; but the case has been decided otherwise here. *Maclay vs. Work*, 5 B., 161. 22. Where an attorney at law neglects to record the mortgage of a client until other liens are created against the mortgagor's estate, and he has become insolvent, an action can be sustained against the attorney by the mortgagee. *Miller vs. Wilson*, 3 *Pittsburg Journal*, 98. 23. The statute declares, that all mortgages shall have priority according to the date of recording the same. Yet an unrecorded mortgage is good as against the mortgagor or any one claiming under him with notice of the mortgage. *Mellon's Appeal*, 32 Pa., 129. 24. An unrecorded mortgage is good at common law. It is to protect subsequent *bona fide* purchasers or mortgagees, that the statute postpones it. If the junior grantee knows of the first mortgage, though it be unrecorded when he takes his deed, he cannot be injured. *Murphy vs. Nathans*, 46 Pa., 514. 25. An unrecorded mortgage will avail against the mortgagor or his alienee, or mortgagee with notice, or a voluntary assignee for

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creditors. It is neither a lien nor such an estate as stands in the way of an orphans' court sale for the payment of debts; it is no higher than a specialty debt. A debt secured by an unrecorded mortgage without possession taken under it in the lifetime of the mortgagor cannot, upon his death, take precedence of his general debts, but must come in for its share as one of them. *Nice's Appeal*, 54 Pa., 200. 26. A mortgage recorded in only one of two adjoining counties, but embracing a farm lying in both, is not a lien upon the land lying in the county where it is not recorded, except as to the mortgagor and others who have actual notice of its existence. Constructive notice will not arise from a note in the mortgage index, that a part of the mortgaged land lies in an adjoining county where the mortgage is not recorded. *Oberholtzer's Appeal*, 124 Pa., 583. 27. The chief object of recording a mortgage is to give actual notice of encumbrances on title. Mortgages shall not be liens until left for record, except mortgages for purchase money, which continue to be liens from the date of their execution, if recorded within sixty days thereafter. *Parke vs. Neeley*, 90 Pa., 52. 28. Unless a purchase-money mortgage be recorded within sixty days after its date, other encumbrances recorded or entered prior to its recording are a prior lien on the property. *Parke vs. Neeley*, 9 W. N., 193. *Everhart vs. Ferguson*, 1 W. N., 102. *Woodrow vs. Blythe*, 2 Delaware Co., 18. 29. The act of 1715 declares, that no mortgage shall be good or effectual to pass any estate unless it be recorded. It makes no exception. Yet such a mortgage has always been held good against all persons except subsequent purchasers from the mortgagor or mortgagees without notice. It is good against execution creditors of the mortgagor. Such creditors cannot be defrauded by a secret transfer, and recording acts are not made for their benefit. *Richardson vs. Montgomery*, 49 Pa., 209. 30. An agreement by the parties thereto, that one of two mortgages executed at the same time, shall be the prior lien, will be enforced as between the parties, although the mortgage postponed was first recorded. *Rigler vs. Light*, 90

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Pa., 235. 31. A mortgagee, with notice of an outstanding unrecorded mortgage, is not considered to be a *bona fide* purchaser, and is not allowed to reap any advantage from the recording acts, for he is not one whom such acts were designed to protect. *Rixstine's Estate*, 3 Pa. Dist., 227. 32. An unrecorded mortgage, is not a lien on the land against a subsequent judgment creditor. The judgment gives the creditor a general lien; the mortgage a specific one. The mortgage is but a security for the debt, specific and limited. *Semple vs. Burd*, 7 S. & R., 286. 33. A mortgage is void against subsequent purchasers and mortgagees, if not recorded in proper time and place, unless recorded before the subsequent ones. *Souder vs. Morrow*, 33 Pa., 84. 34. A purchaser from one whose deed is unrecorded, is affected with notice of an unrecorded mortgage mentioned in his receipt for purchase money at the foot of such deed. *Steckel vs. Desh*, 12 W. N., 130. 35. If the vendor, at the time of parting with his title, takes a mortgage or judgment as a part of the transaction to secure his purchase money, he retains a lien upon the estate conveyed, not to be displaced by any other encumbrance, provided the mortgage be recorded within the sixty days allowed therefor, or the judgment be entered on the same day. *Stoner vs. Neff*, 50 Pa., 258. 36. If the purchaser of a property knows, at the time of the purchase, of the existence of a mortgage, which has not been recorded, the premises will be bound by the mortgage. *Stroud vs. Lockart*, 4 D., 153. 37. Notice of a mortgage to a purchaser at sheriff's sale will affect him equally with a registry. *Solms vs. McCulloch*, 5 Pa., 473. Overruled, *Uhler vs. Hutchinson*, 23 Pa., 110. 38. The holder of an unrecorded mortgage, or of a mortgage illegally recorded, by giving notice of its existence, at a sheriff's sale upon a judgment, cannot bind the estate mortgaged in the hands of a purchaser at such sale, where the judgment creditor had no notice of the mortgage when his judgment was entered. Where the mortgage is made by an absolute conveyance with a deed of defeasance,

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and the defeasance is unrecorded, it will be considered an unrecorded mortgage. Mortgages must be recorded in mortgage books to be liens. *Uhler vs. Hutchinson*, 23 Pa., 110. *Calder vs. Chapman*, 52 Pa., 362. 39. Although a mortgage imperfectly recorded is ineffectual as a lien against subsequent judgment creditors, yet if there be a second mortgage recorded before the judgments entitled to the proceeds, and such mortgagee had actual notice of the first mortgage when he took his own, the first mortgage is good as to him, and, therefore, entitled to have the money appropriated to it or so much thereof as is necessary to satisfy it. The creditors subsequent to the second mortgage could not come in until it was satisfied, and it cannot be until the first mortgage is. *Wilcocks vs. Waln*, 10 S. & R., 380. *Manufacturers Bank vs. Bank of Penna*, 7 W. & S., 335. *Loucheim Bros.' Appeal*, 67 Pa., 53. 40. Where a proper book is kept for the purpose of showing when a mortgage is left for record, the lien of the mortgage begins from the time of the entry in this book, and the delay of the recorder in recording or indexing a mortgage will not divest its lien. It is not incumbent upon the mortgagee to supervise the recorder and see that the mortgage is recorded and indexed. *Woods & Brown's Appeal*, 82 Pa., 116. *Brown & Wood's Appeal*, 3 W. N., 35. *Brown's Appeal*, 24 Pittsburg Journal, 38.

XLV. NEGLECT TO RECORD ASSIGNMENT. 1. An assignee of a mortgage is not obliged to record the assignment, as the mortgage is a subsisting legal encumbrance. *Goff vs. Denny*, 2 Phila., 275. 2. The assignee of a mortgage, under the recording acts, is not bound to register his assignment. He stands in the position of the mortgagee so far as regards the legal title, but is unaffected with an equity of which he had no knowledge, and against which he could not have guarded himself. *Mott vs. Clark*, 9 Pa., 399; but see *Phillips vs. Bank*, 18 Pa., 402. *Fisher vs. Knox*, 13 Pa., 626. 3. Under the act of April 9, 1849, recording the assignment of a mortgage is notice to a subsequent assignee, even if no actual notice of

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the prior assignment has been given him.¹ *Pepper's Appeal*, 77 Pa., 373. 4. Recording an assignment of mortgage is not necessary as against one who has actual notice thereof. *Quein vs. Smith*, 108 Pa., 325. 5. Since the act of April 14, 1849, the recording of an assignment of a mortgage is a duty which the assignee owes to subsequent purchasers and assignees. Where the assignment is on the back of the bond, though not recorded, a subsequent assignee of the bond and mortgage, who does not require the production of the bond, is himself guilty of supineness, and must suffer the loss, if any. *Sharpe vs. Hutchinson*, 1 Kulp, 405.

XLVI. NEGLECT TO RELEASE. The mortgagee is not bound to release any part of the mortgage without the payment of the entire principal. *Home Building Ass'n vs. Troth*, 3 Delaware Co., 169.

XLVII. NEGLECT TO SATISFY. 1. The fact of a mortgagee becoming the owner of the mortgaged premises, is notice to a purchaser from the mortgagee that the mortgage is satisfied; and this although the land was sold at sheriff's sale, subject to the lien of the mortgage. *Brown vs. Simpson*, 2 W., 233. 2. A court of equity will not decree the satisfaction of a mortgage, unless it is proved to have been paid; lapse of time is not sufficient ground for its interference. *Coates vs. Roberts*, 2 Phila., 244. *McMullin's Petition*, 1 W. N., 403. 3. Under the statute, an action will lie for damages for neglect of a mortgagee to enter satisfaction on a mortgage which has been paid, and which he has been requested to mark satisfied of record. *Haubert vs. Haworth*, 78 Pa., 78. 4. Where the wife sold her real estate, and a mortgage for part of the purchase money was taken in the name of the husband and wife, they are not accounted joint mortgagees, and payment to him with his entry of satisfaction will not discharge the mortgage, but the wife may recover thereon in a *scire facias* against the mortgagor. Entry of satisfaction in such case is not evidence of payment even to the husband. *McKinney vs. Hamilton*, 51 Pa., 63. 5. Where a bond accompanied a mortgage and the

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bond was paid, but the mortgagee, a bank, instead of satisfying the mortgage, retained it as security for further discounts, held, that as to judgment creditors the mortgage was satisfied, and the lien was not continued. *Mitchell vs. Coombs*, 96 Pa., 430.

6. A bill in equity for entry of satisfaction on a mortgage must allege something more than delivery, execution and payment, and the refusal of the mortgagee to enter satisfaction. It should show who is the legal holder, and the tender of reasonable charges. *Owens vs. Owens*, 1 C. P. Reporter, 15. 7. Where a mortgage is due, and there is a dispute as to the amount unpaid, the mortgagor may, under the act of April 3, 1851, upon petition to the court, pay into court the principal and interest claimed, together with commissions and costs, and the court shall thereupon order the mortgage satisfied of record. *Pennock vs. Stewart*, 104 Pa., 184. 8. Where a terre tenant has procured the payment of a mortgage, although he has neither obtained possession of the mortgage nor had it satisfied, his equity is superior to that of an assignee of the mortgage who, at the time of the assignment, made no inquiry of the mortgagor who had sold the property to the terre tenant in a deed that contained no reference to the mortgage. *Sellers vs. Benner*, 94 Pa., 207. 9. A court of equity has jurisdiction to decree the satisfaction of a mortgage, where the remedy at law is not adequate. *Walsh vs. Leonard*, 2 Schuylkill Record, 157.

Municipal Claims.

I. NEGLECT IN ADVERTISING SCIRE FACIAS. Under the act of March 11, 1846, a copy of the writ of *scire facias* on a municipal claim for taxes must be posted on a conspicuous part of the premises, and a brief notice thereof published in a daily newspaper in the county twice a week for two weeks before the return day. Without notice to the owner, land cannot be taken from him under this act without an observance of all its substantial requirements. *O'Byrne vs. Philada.*, 93 Pa., 225.

II. NEGLECT IN APPORTIONING. A municipal lien cover-

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ing two distinct properties separated from each other by a public street is void, but where the claim is apportioned, so that one of the properties may be stricken from the lien without disturbing the remainder of the lien, an amendment to that effect will be permitted. *South Bethlehem vs. Davis*, 6 Montgomery Co., 80. 2 Northampton Co., 163.

III. NEGLECT IN AVERMENTS. 1. A municipal lien must state the claim with precision. A claim for "conduit gas" is too vague, and on motion will be stricken off. *Commissioners vs. Flanigan*, 3 Phila., 458. 2. A lien upon a municipal claim for paving being of purely statutory creation, if the claim do not aver upon its face all the facts necessary to sustain its validity, it may be summarily stricken off on motion. The claim need not set forth the provisions of the ordinance under which the work was to be done. That is to be proved at the trial. *Philadelphia vs. Richards*, 124 Pa., 303.

IV. NEGLECT IN DEFENCE TO. An affidavit of defence to a municipal claim for paving, averring that the work was badly done, without alleging the specific defects and the special injury to the defendant, is insufficient to prevent summary judgment. *Pittsburg vs. MacConnell*, 130 Pa., 463. *Erie City vs. MacConnell*, 120 Pa., 374.

V. NEGLECT IN DESCRIPTION. 1. Municipal claims require substantially the same precision as mechanics' liens. Unless they state the nature and kind of the work done, and the place where, and the time when it was done, the claims are defective and should be stricken off on motion. *City of Philadelphia vs. Sutter*, 30 Pa., 53. 2. An amendment of a municipal claim will be allowed, where it cannot affect intervening rights. *City vs. Wagner*, 9 W. N., 511. 3. The description of the premises must be very defective, before the court will strike off a municipal lien for insufficiency of description. This is a matter that is ordinarily referred to a jury. *Jenkintown vs. Firmstone*, 3 Northampton Co., 299. 9 Lancaster Review, 406. 4. Where a municipal claim described a property as "lot No. 21 in block 28, as laid out and numbered on the

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assessment map on file in the office of the city clerk," it is insufficient, and will be stricken off. *Scranton City vs. Jones*, 133 Pa., 219.

VI. NEGLIGENCE IN ENTERING SATISFACTION. An entry of satisfaction, when entered through the mistake of a city official will be vacated by the court. *City vs. Thomas*, 9 W. N., 240.

VII. NEGLIGENCE IN LUMPING PROPERTIES. It is not, *per se*, a fatal defect in a municipal claim, that it is filed as against a single lot of ground, whereas, in fact, the ground, though not physically divided, consists of four separate lots as laid out on the plans registered in the survey department; the owner being the same, and no hardship occasioned. *City of Phila. vs. Cadwalader*, 22 W. N., 8.

VIII. NEGLIGENCE IN NAME OF OWNER. 1. Under the acts of April 1, 1864, and of March 29, 1867, it is essential to the validity of a municipal claim filed against property in Philadelphia, the title to which has been duly registered, that the claim shall be filed in the name of the registered owner, and after thirty days' actual notice to him. A municipal claim for benefits accruing from the opening of a street filed against property, the title to which has been duly registered in the name of "unknown owner, or reputed owner, or whoever may be owner," is voidable. *Gans vs. Phila.*, 102 Pa., 97. 2. A sale under a municipal lien against "J. Bedford," of premises which had been properly registered by the owner in her correct name "Jane Belford," will not divest the title. The change of names was too great to give reasonable notice to her that she was the person intended. *Green vs. Bedford*, 4 Pennypacker, 65. 3. Where the owner of a property has neglected to see to it that his property was assessed in his own name, he does so at his own peril, and his property is liable for municipal claims, as the charge is against the property alone. *White vs. Ballantine*, 96 Pa., 186.

IX. NEGLIGENCE IN OMISSION OF DATES. 1. An objection to a lien for want of dates, may be made on demurrer, or on a motion to strike it off, but after pleading to the *scire facias*,

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that is deemed waived. *Howell vs. Phila.* 38 Pa., 471.

2. Municipal claims for paving and curbing require substantially the same precision as to mechanics' liens, but claims for the expenses attending the removal of nuisances are not so strict in requiring the insertion of the time when the work was done. *Kennedy vs. Board of Health*, 2 Pa., 366. *City of Phila. vs. Gratz Land Co.*, 38 Pa., 360.

X. NEGLECT IN PAYING. A property owner, who pays a municipal claim under protest, may recover the amount on showing the claim to be bad. *Lawrence vs. City*, 14 W. N., 421.

XI. NEGLECT IN RETURN TO WRIT. A return to a writ of *scire facias sur* municipal claim is fatally defective, where it does not show that a true and attested copy of the writ was posted on a conspicuous part of the premises for two weeks before the return day, and does not show the newspaper publication as required by the act of March 11, 1846. *Wistar vs. Philadelphia*, 86 Pa., 215.

XII. NEGLECT IN STRIKING OFF. A municipal claim can only be stricken off for some defect apparent upon the face of the record. *Connelsville vs. Gilmore*, 15 W. N., 343.

XIII. NEGLECT OF NOTICE TO OWNER OF PROPERTY.
1. Preliminary notice to the owner of property to pay is indispensable before the *scire facias* be issued, and a writ issued before such notice is given, will be quashed. *City vs. Hanbest*, 15 W. N., 349. 2. In Philadelphia, since the passage of the registry act, where notice of the municipal claim must be given to the owner of the property affected by the lien, it must be given to the registered owner, if there be one. *Philadelphia vs. Dungan*, 124 Pa., 56.

XIV. NEGLECT OF NOTICE TO PERFORM WORK. Where a municipal ordinance requires prior notice to be given to property owners to do certain work, and upon their failure to do so within a specified time, then the municipality to do the work itself, the absence of a specific averment of such notice and failure is fatal to a claim filed. An amendment to such a claim

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will not be allowed. *Philadelphia vs. Stevenson*, 6 Pa. County, 287.

XV. NEGLECT TO AMEND. The court will not permit an amendment of a municipal claim when it would prejudice the defendant's rights. Amendments should be fortified by affidavit that they are true. *Philadelphia vs. Laughlin*, 20 Phila., 350.

XVI. NEGLECT TO FILE. Under the act of January 6, 1864, municipal claims must be filed within six months from the completion of the work. A failure to comply therewith will defeat the lien. The six months are computed from the time the contractor finished the work. *Pittsburg vs. Knowlson*, 92 Pa., 116.

XVII. NEGLECT TO OBTAIN JUDGMENT. Judgment must be obtained on a municipal claim within five years after issuing the original *scire facias*, or the claim will be lost. It cannot be preserved longer than five years by an alias *scire facias*. *Philadelphia vs. Carr*, 21 W. N., 444.

XVIII. NEGLECT TO DIVEST LIEN. The act of March 11, 1846, provides that the lien of a municipal claim shall not be divested by any judicial sale, as respects so much thereof as the proceeds of such sale may be insufficient to discharge and pay. This is the case, even where such judicial sale is on a second municipal claim; the lien of the preceding claim remains unless the sale realizes enough to pay it. *Philadelphia vs. Meager*, 67 Pa., 346.

XIX. NEGLECT TO POST WRIT OF SCIRE FACIAS. Under the act of March 11, 1846, a true and attested copy of the writ must be posted in a conspicuous part of the premises, and notice must be advertised twice a week for two weeks. Where the owner of the property, however, enters an appearance in the case, the right to object to the notice is waived. *City vs. Olive Cemetery Co.*, 6 W. N., 238. *Philadelphia vs. Sanger*, 5 W. N., 535.

XX. NEGLECT TO PRESS SCIRE FACIAS. 1. A *scire facias sur tax* claim must be prosecuted to judgment within five years, in order to preserve the lien. *City vs. Scott*, 3 W. N., 562.

Municipal Claims—Continued.

2. Where no judgment has been obtained on a municipal claim within five years from the issuance of a writ of *scire facias*, held, that the lien of the claim had expired. *South Easton vs. Norton*, 2 Northampton Co., 130.

XXI. NEGLECT TO REDEEM PROPERTY SOLD. Under the act of January 23, 1849, the owner of property sold for municipal claims has the right of redemption, if within one year he tender the redemption money to the purchaser at sheriff's sale. The right to the redemption money does not pass to the vendee of such purchaser by a deed for the premises. If the purchaser refuse the tender thus made, the owner has twenty-one years to bring an ejectment. *Hess vs. Potts*, 32 Pa., 407. See as to the act of May 13, 1856. *Gault's Appeal*, 33 Pa., 94.

XXII. NEGLECT TO REVIVE. The lien of a municipal claim can only be preserved by a revival of *scire facias* within each recurring period of five years. The lien once lost cannot be restored by *scire facias* to revive said judgment, although the defendant remain the owner of the premises against which the claim was filed. The judgment creates no personal liability on the part of the defendant. *Haddington Church vs. Philadelphia*, 108 Pa., 466. *Philadelphia vs. Unknown*, 23 W. N. 371.

XXIII. NEGLECT TO SIGN. A municipal claim may be filed without being signed by the party or his attorney. *Rodney vs. City*, 3 Walker, 505.

XXIV. NEGLECT TO SPECIFY THE OWNER OF THE PROPERTY. 1. A municipal claim for a street improvement is a proceeding *in rem*. It is filed against the abutting property, and involves no personal liability on the part of the owner. By the terms of the act of April 1, 1870, any error or irregularity in regard to the name of the owner is cured by the sheriff's sale. *Emrick vs. Dicken*, 92 Pa., 78. 2. Municipal liens for assessment for benefits from widening of streets, need not be filed against the real owner. *Philadelphia vs. Rhoads*, 16 Phila., 5.

Municipal Corporations.

I. NEGLECT IN AWARDING CONTRACTS. 1. The act of May 23, 1874, provides that all work and materials required by a city shall be done and furnished under contract to be given to the lowest responsible bidder. But an officer will not render himself individually liable to the lowest bidder by rejecting all bids offered, in the honest and judicious exercise of his discretion. *American Pavement Co. vs. Wagner*, 139 Pa., 623. 2. The councils of Philadelphia may, by resolution, award a contract for paving to a person not the choice of owners of adjacent property who will be liable for the expense. *Dickinson vs. Peters*, 6 W. N., 458. 3. The statute directing that contracts shall be awarded to the lowest responsible bidder, imposes duties upon city authorities which are not simply ministerial, but discretionary and deliberative, and courts will not restrain those authorities from awarding a contract to one who is not the lowest bidder, even though their action had been indiscreet, unless it is shown that they have acted corruptly and in bad faith. *Findley vs. Pittsburg*, 82 Pa., 351. *Conner vs. Board of Health*, 7 Phila., 629. *McLaughlin vs. Kneass, Idem*, 634. 4. Under a city ordinance, which provides that a contract should be awarded to the lowest bidder, municipal contracts must be awarded to the lowest bidder who is pecuniarily able to carry out the contract. *Inter-State Brick Co. vs. Philadelphia*, 34 W. N., 567. 5. A municipal corporation will not be enjoined against awarding a contract to a bidder higher than the complainant, when the latter has violated the terms of the ordinance inviting the bids. *Wiggins vs. Philadelphia*, 2 Brewster, 444.

II. NEGLECT IN CARE OF PROPERTY. Whatever a diligent man would deem necessary under any given circumstances for the preservation of his own property, must be done by the corporation or city that undertakes, for hire, the preservation of property for the public. *Willey vs. Allegheny*, 118 Pa., 490.

III. NEGLECT IN CONSTRUCTION OF GAS MAINS. The city of Philadelphia is not responsible for an injury arising from an escape of gas from a street main, unless it is caused

Municipal Corporations—Continued.

by some negligence or misconduct of the city or its agents. *Strawbridge vs. Philadelphia*, 13 Phila., 173. *Strawbridge vs. Philadelphia*, 7 W. N., 537.

IV. NEGLIGENCE IN THE CONSTRUCTION OF PUBLIC WORKS. For negligence, either in the construction or repair of public works, where repair is a duty, the corporation itself must respond in damages for a special injury caused by its negligence. When, however, a municipality is in the lawful and proper exercise of the power of the state, such as in the improvement of a highway, it is not liable for the injuries which flow collaterally from the execution of the power. *Allentown vs. Kramer*, 73 Pa., 409.

V. NEGLIGENCE IN CONTRACT. Although an agent of a city exceeded his authority in making a contract, yet if the contract was one which the city might have authorized, it could waive the irregularity and adopt the contract after it was made. *City vs. Hays*, 93 Pa., 72.

VI. NEGLIGENCE IN EXCAVATING STREETS. A municipal corporation is not liable for damages resulting from the digging of a trench in a street by a private individual, under a license from the authorities, to connect with the main conduit water pipe. *West Chester vs. Apple*, 35 Pa., 284.

VII. NEGLIGENCE IN EXECUTION. A *fi. fa.*, in the ordinary form, cannot issue upon a judgment against the city of Philadelphia. The writ must be a mandamus execution under the act of April, 1836. *Monaghan vs. Philadelphia*, 28 Pa., 207.

VIII. NEGLIGENCE IN FORUM OF ACTION. A municipal corporation can be sued either upon a contract or for a tort only in the courts of the county where it is situated. An action against such a corporation is not transitory, but local. *Heckscher vs. Philadelphia*, 20 W. N., 52. *Church vs. Scranton*, 2 Kulp, 516. *Potts vs. Pittsburg*, 14 W. N., 38.

IX. NEGLIGENCE IN TAKING PRIVATE PROPERTY. Private property cannot be taken and appropriated by a city, except in pursuance of law. Where in laying out a street, a city erects

Municipal Corporations—Continued.

a wall on private property without sanction of law, it is a trespasser. *Western Penna. R. R. vs. Allegheny*, 92 Pa., 101.

X. NEGLIGENCE IN GRADING STREETS. 1. Municipal corporations are not answerable for an injury arising from the grade which they give to their streets. *Charlton vs. Allegheny City*, 1 Grant, 208. 2. Where city authorities act under an authority to grade streets, it is error in an action on the case against them for obstructing the flow of water, to submit to the jury their ostensible motives in making changes in the ascent and descent of streets. *Mayor of Philadelphia vs. Randolph*, 4 W. & S., 514.

XI. NEGLIGENCE OF ITS AGENTS. 1. In exercising acts for its corporate benefit, a municipal corporation is liable, like an individual, for the action of its agents or servants; but in performing acts discretionary on its part, or for the purposes of government and for the general public good without benefit to it in its corporate capacity, it is not liable for the acts of its appointees or officers. It is not liable for the negligence or misfeasance of its firemen or police. *Freeman vs. Philadelphia*, 7 W. N., 45. 2. Where an agent or officer of a city employed others to do work under his instructions and personal direction, the city would be responsible for anything resulting therefrom by reason of negligence or defective work. Where, in constructing new water works, through defective machinery and negligent works an explosion occurred, resulting in the death of a workman, the city was held responsible, as its agent had the direction of the work. *Harrisburg vs. Taylor*, 87 Pa., 216.

XII. NEGLIGENCE OF APPROPRIATION. Where there is no appropriation, the city cannot be compelled to make expenditures, and if she has done so, she cannot recover. *Philadelphia vs. Wister*, 17 Phila., 13.

XIII. NEGLIGENCE OF CONTRACTORS. 1. Where a board of commissioners in a city for a special purpose is created wholly independent of the city authorities, the city cannot be held liable for their negligence, especially where, as in this case,

Municipal Corporations—Continued.

they are appointed by the court, and neither account nor owe obedience to the city authorities. *Ashby vs. Erie*, 85 Pa., 286.

2. A municipality is not liable for the negligence of a contractor exercising an independent employment, unless by the terms of the contract the contractor is under its management. The fact that a city has taken a bond of indemnity from the contractor against loss or damage from his failure to perform his duty makes no difference. *Erie vs. Caulkins*, 85 Pa., 247.

3. The city of Philadelphia is liable for a defect in the highway rather than the contractor, unless his contract was at the time of the accident in writing and executed in accordance with the requirements of the act of June 1, 1885. To absolve the city, it must be shown that the work on the highway, in this case digging a trench, was legally let to an independent contractor, under whose supervision and control it was being prosecuted when the plaintiff was injured. *Hepburn vs. Philadelphia*, 149 Pa., 335.

4. The rule that in actions for negligence, municipal corporations may in certain cases cast the responsibility upon an independent contractor whose negligence caused the injury, has never been extended to corporations for profit. *Lancaster Avenue Co. vs. Rhoads*, 116 Pa., 377.

5. A municipal corporation is not responsible for an injury occasioned by the negligence of contractors, or their agents or servants, but the remedy for such an injury is against the contractors alone. *McMasters vs. R. R.*, 3 Pittsburg, 1. *Painter vs. The Mayor of Pittsburg*, 46 Pa., 213.

80 Pa., 105. 6. The city is liable for the killing of a boy in the building of a bridge, although it was built by contract, where the work was intrinsically dangerous. *Rose vs. Philadelphia*, 2 Foster, 153.

XIV. NEGLIGENCE OF DUTY. To render a municipal corporation liable for injuries resulting from the neglect of a duty, the duty must be absolute or imperative, not such as is entrusted to the discretion of the municipal authorities. *McDade vs. Chester*, 3 Delaware Co., 345.

XV. NEGLIGENCE ON THE PART OF EMPLOYEE. 1. In an action

Municipal Corporations—Continued.

against a city to recover damages for personal injuries resulting by being knocked down by an employee of a city, the question of the defendant's negligence is for the jury, where the evidence of the plaintiff is that plaintiff while crossing the street was knocked down by a team belonging to the city. *Bodge vs. Phila.*, 167 Pa., 492. 2. As a general rule, a municipality, in the performance of certain public functions, delegated to it by the sovereignty of a state, is an agent of the government, and is not liable for the malfeasance or negligence of its officers or employees. The officers are themselves personally liable for their malfeasance or misfeasance in office, but for neither is the corporation responsible. In order to charge a municipal corporation for negligence in the performance of a public work, the law must have imposed a duty upon it, so as to make that neglect culpable. *Boyd vs. Insurance Patrol*, 113 Pa., 278. 3. The city of Philadelphia is not liable for injuries caused by the negligent driving of a fire engine through the streets by an employee of the fire department. *Knight vs. Phila.*, 15 W. N., 307. *Buchanan vs. Phila.*, 1 W. N., 600. *Rosenberry vs. Phila.*, 7 W. N., 558. *Knight vs. City*, 12 W. N., 421.

XVI. NEGLIGENCE OF NOTICE OF NEGLIGENCE ACT. In order to charge the city with the consequences of the negligence of a person in placing an obstruction upon the sidewalk, it is requisite to show actual or constructive notice to the city. *Davis vs. Corry*, 154 Pa., 601.

XVII. NEGLIGENCE OF THEIR OFFICERS. 1. A municipality cannot be made liable in damages for the mistakes which may be committed by its officers in the honest, fair exercise of their duties. A municipality built a sewer adjacent to a creek, but not of sufficient size to drain it. During a rainstorm it overflowed, and a suit for damages resulted; held, that the city was not liable. *Collins vs. Phila.*, 93 Pa., 272. 2. Where authority is given to the officers of a borough to make regulations necessary to the health and cleanliness of the borough, the neglect of the officers to act is a misdemeanor, punishable by indictment. *Comm. vs. Bredin*, 165 Pa., 224. 3. The

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charter of a municipal corporation is not liable to forfeiture for the neglect of its officers not affecting the rights of the public. *Comm. vs. Pittsburg*, 14 Pa., 177. 4. As a general rule, a municipal corporation is not responsible for the unauthorized or unlawful acts of its officers and agents, or for their negligence in the execution of their duties. Such officers are agents of the government, though appointed by the corporation, and are personally liable for their malfeasance or nonfeasance. *Hand vs. Phila.*, 20 Phila., 285. 5. The city, as to the officers in charge of its waterworks, stands in the relation of principal and agent, and the city is liable for their negligence and irregularities in the scope of their duties. The right of the city to draw water for the purpose of manufacturing, or for baths, or for propelling power, is subordinate to the right of navigation. *Philadelphia vs. Gilmartin*, 71 Pa., 141. 6. *Prima facie*, a municipal corporation is not liable for the trespass and wrongful acts of its officers, though done *colore officii*, but it will clearly be liable, where the act, if not wholly *ultra vires*, was expressly authorized by the governing body of the corporation, or where it was ratified by it. The city is not liable for the acts of policemen, who are not municipal but public officers. *Sharp vs. Wilkesbarre*, 9 Luzerne Register, 98. 7. Township officers are not personally liable for acts done honestly in the exercise of the discretion given them by law, though it be exercised so mistakenly as to injure private property or individuals; but they are liable if they act maliciously and wantonly. *Yealy vs. Fink*, 43 Pa., 212. 8. As a general rule, a municipal corporation is not responsible for the unauthorized or unlawful acts of its officers and agents or for their negligence. It is not bound by the acts of a public officer who is elected by the people, and over whom it has no control. *Hand vs. Phila.*, 8 Pa. County, 213. *Phila. vs. Anderson, Idem*, 417.

XVIII. NEGLECT OF THEIR POLICEMEN. 1. Where a city only authorizes a lawful act to be done in a lawful manner, it is not responsible for acts of its officers outside of the

Municipal Corporations—Continued.

authority. In order to charge a municipal for negligence in the performance of a public work, the law must have imposed a duty upon it so as to make the neglect culpable. Where a horse was taken into custody by the police, and through negligence escaped and was killed, held, that the city was not responsible. *Elliott vs. Phila.*, 75 Pa., 347. 2. The conservation of the peace is not a part of the duty of municipalities; that belongs to public officers, for whose misconduct the municipality is not liable. Where a party was injured by the firing of a cannon on a public street, the borough is not liable, although the firing had been going on for several hours in the presence of a policeman. *Norristown vs. Fitzpatrick*, 1 Chester Co., 10. 8 W. N., 459.

XIX. NEGLIGENCE OF THIRD PARTIES. A city is not responsible for negligence, where the proximate cause of the accident is the carelessness or negligence of a third person. *Eisenbrey vs. Phila.*, 19 Phila., 504.

XX. NEGLIGENCE OF SURVEYOR. A city corporation is not responsible to a lot-owner for damages resulting from negligence on the part of a district surveyor, in locating the line of his lots, so that after the partial construction of a house, he was compelled to rebuild it. *Alcorn vs. Phila.*, 44 Pa., 348.

XXI. NEGLIGENCE TO ADVERTISE CONTRACTS. Where the law requires, that contracts for certain municipal work shall only be made after due advertisement and to the lowest bidder, the municipality cannot make a binding contract unless in this prescribed manner. *Addis vs. Pittsburg*, 85 Pa., 379.

XXII. NEGLIGENCE TO AWARD CONTRACTS. Under an ordinance of the city of Philadelphia, a person applying for the contract of paving must give notice of such application in two daily papers having the largest circulation in said city by three insertions at least two weeks before making such application. Unless he do so, he is not entitled to the contract. *City vs. Sanger*, 8 W. N., 151.

XXIII. NEGLIGENCE TO CLAIM LAND. The statute of limitations runs against a county or other municipal corporation.

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Nullum tempus occurrit reipublicæ applies to the sovereign only. Her grantees, though artificial bodies created by her, are in the same category with natural persons. *Evans vs. Erie Co.*, 66 Pa., 228.

XXIV. NEGLECT TO CONSTRUCT SEWERS. An action will not lie against a municipal corporation for neglecting to construct a proper system of drainage. *Carr vs. Northern Liberties*, 35 Pa., 324.

XXV. NEGLECT TO EXERCISE POWERS. 1. A municipal corporation is not liable to an action for damages for the non-exercise of discretionary powers of a public character. Where the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed. *Carr vs. Northern Liberties*, 35 Pa., 324. *Lehigh Co. vs. Hoffort*, 116 Pa., 128. *McDade vs. Chester City*, 117 Pa., 424. 2. A municipal corporation can exercise no power which is not in express terms, or by implication, conferred upon it. *Dalrymple vs. Wilkesbarre*, 11 Luzerne Register, 41. 3. A grant to a municipal corporation of the power to prohibit specified nuisances, does not impose upon it a duty to exercise the power. *McDade vs. Chester*, 2 Lancaster Review, 249.

XXVI. NEGLECT TO FULFIL CONTRACT. 1. The city of Philadelphia, under the act of April 28, 1858, is not liable on a contract not made by any express authority from councils for a greater sum than has been appropriated by councils for such work. *Continental Bridge Co. vs. Philadelphia*, 12 Phila., 185. 2. A contract of a city, binding when made, is not alterable afterwards by an act of the legislature. *Struthers vs. Philadelphia*, 4 W. N., 378.

XXVII. NEGLECT TO PAY CONSEQUENTIAL DAMAGES. A municipal corporation is not liable to an action for consequential damages to private property, where the act complained of was done under a valid act of assembly, and there was no want of reasonable skill and care in the execution of the power. *Malone vs. Philadelphia*, 12 W. N., 396.

XXVIII. NEGLECT TO REPAIR PUBLIC WORKS. For negli-

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gence either in the construction or repair of public works, when repair is a duty, municipal corporations must respond in damages whenever special injury results. *Allentown vs. Kramer*, 152 Pa., 30.

XXIX. NEGLIGENCE TO REPAIR HIGHWAYS. A municipal corporation, charged with the duty of keeping highways in repair, is not liable to the owner or occupier of property fronting thereon for the loss to his business resulting from the neglect of such duty. *Gold vs. Philadelphia*, 115 Pa., 184.

XXX. NEGLIGENCE TO REMOVE NUISANCES. Where on the sidewalk of a public street, a pole had been erected by citizens and allowed to remain so long a period as to become unsafe and rotten, it was the duty of the municipality to remove it. Failing to do so, the town was liable for injury received by the driver of a vehicle who was loading his cart at the time the pole fell on him. *Norristown vs. Moyer*, 67 Pa., 356.

XXXI. NEGLIGENCE TO REMOVE SNOW FROM STREETS. A municipal corporation is liable for damages for injuries for neglect of its officers in not keeping its streets and bridges in repair. If it negligently permits a dangerous obstruction in a public highway, which it could have removed, it is liable for damages to a person injured thereby without any fault of his own. A town allowed ice and snow to accumulate in ridges on a sidewalk and remain for weeks, and the plaintiff in an action slipped on it, fell, and was injured. If the obstruction was of such long duration as to be generally observable, the town was chargeable with constructive notice. *McLaughlin vs. Corry*, 77 Pa., 199. *Mauch Chunk vs. Kline*, 100 Pa., 119. *Erie City vs. Schwingle*, 22 Pa., 384.

XXXII. NEGLIGENCE TO SUPPLY WATER. An act of assembly empowered a city to build reservoirs. One of these structures became in time valueless. A fire occurred near this reservoir, and no water could be obtained from it, and as a result destruction of property followed. The owner of the property claimed damages, alleging negligence on the part of the city. Held, that it was discretionary with the city to construct and main-

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tain reservoirs, and that the city was not liable. *Grant vs. Erie*, 69 Pa., 420.

XXXIII. NEGLECT TO REPAIR WHARVES. Where a city owns a wharf and collects tolls for its use, it must keep it in repair. *Pittsburg vs. Grier*, 22 Pa., 54.

Murder.

NEGLECT OF CRIMINAL INTENT. 1. Where a deliberate purpose is formed to kill a person and the defendant fires a pistol at him for that purpose, the fact that the ball misses its intended victim and kills another person, does not relieve the murderer. *Comm. vs. Breyessee*, 160 Pa., 451. 2. Murder in the second degree is where a felonious and malicious homicide is committed, but without a specific intent to take life. *Comm. vs. Crozier*, 1 Brewster, 349. 3. To constitute the offence of murder, the killing must be (1) Without justification or excuse. (2) It must be malicious. (3) It must be wilful, deliberate and premeditated. *Comm. vs. Hart*, 2 Brewster, 546.

Mutual Negligence. See "CONCURRENT NEGLIGENCE,"
"CONTRIBUTORY NEGLIGENCE."

N

Names.

I. NEGLECT IN CHANGING. Though the custom is universal for all males to bear the name of their parents, there is nothing in the law prohibiting a man from taking another name if he pleases. There is no penalty or punishment for so doing, as all the law looks to is the identity of the individual. *Snook's Petition*, 2 Pittsburg, 26.

II. NEGLECT IN INITIALS. The initials preceding a surname in a signature are always understood to be the initials of a name, and not the abbreviation of a title. *Burford vs. McCue*, 53 Pa., 431.

III. NEGLECT IN AMENDING IN AN ACTION. Whenever a mistake or omission has been made in the name of a party to an action, the courts are authorized by the act of May 4, 1852, in any stage of the proceedings, to permit amendments. *Fidler vs. Hershey*, 90 Pa., 363.

IV. NEGLECT IN SIGNATURE. In the distribution of the proceeds of a sheriff's sale among lien creditors, it is not error for the auditor to decide, upon sufficient evidence, that the defendant sometimes wrote his name with a middle letter, as in the first judgment to which distribution was awarded, and sometimes without, as in the subsequent judgments. That is a fault of the defendant, and not of his creditor. *Mahler's Appeal*, 38 Pa., 220.

V. NEGLECT TO INSERT CHRISTIAN NAME. A notice of a rule to take testimony, wherein the first name of the commissioner was omitted, but his surname, official position and locality were specified, is sufficiently descriptive, if there appears to have been no other person of the same name and title in the place. *Kellum vs. Smith*, 39 Pa., 241.

Naturalization.

NEGLECT TO RECENTLY OBTAIN. An alien lawfully assessed, paying the tax, and in other respects qualified, is entitled to vote, although he may have been naturalized within ten days of the election. A certificate of naturalization cannot be impeached collaterally. *Anonymous*, 1 Brewster, 158. *Comm. vs. The Sheriff, Idem*, 183.

Necessaries.

I. NEGLECT TO FURNISH. If a husband neglects to supply his wife with necessaries, he makes her impliedly his agent to purchase them. If he supplies her with necessaries suitable to her degree, he is not liable for debts contracted by her without his authority and against his consent. During cohabitation, however, there is a presumption of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate. *Wiler vs. Fiegel*, 10 W. N., 240.

II. NEGLECT TO PAY FOR. An infant may be liable for necessaries, but there can be no recovery upon his bond, even for necessaries. Much more should this rule prevail in the case of a *feme covert*, for an infant's contracts are generally but voidable, while hers are generally void. *Glyde vs. Keister*, 32 Pa., 85.

Negotiable Securities.

I. NEGLECT OF HOLDER. The owner of negotiable securities, which have been stolen, has the right to follow them whenever he can find them, and to reclaim them in whose hands soever they may be found. He has the same right to recover them from the holder, unless he has taken them in the usual course of business for value without notice of the theft, that he has to recover a stolen chattel. The burden of proof in such case is on the holder. *Robinson vs. Hodgson*, 73 Pa., 202.

Negroes.

I. NEGLECT OF CIVIL RIGHTS. 1. Before the act of March 21, 1867, the separation of black and white passengers

Negroes—Continued.

in a public conveyance was the subject of a sound regulation to secure order and promote comfort. *West Chester R. R. vs. Miles*, 55 Pa., 21. 2. A conductor of a passenger car has no right to eject a passenger on account of color or race. No regulation of the company will justify such a proceeding or protect him from liability in damages. *Derry vs. Lowry*, 6 Phila., 30. 3. Where colored people purchased tickets to reserved seats in a theatre, such purchasers had more than a mere license, which the agents of the defendant had no right to revoke. The right of such holders of tickets for reserved seats was more in the nature of a lease, entitling them to peaceable ingress and egress, and exclusive possession of the designated seats during the performance of that particular evening. As patrons of defendant's theatre they were entitled to protection from injury at the hands of his employees and for damages for forcible ejection from the theatre. *Drew vs. Peer*, 93 Pa., 234. 4. In an action of trespass brought by a negro against an officer or agent of a passenger railway company to recover damages for his expulsion from one of the cars, the regulation of the company, under which the plaintiff was expelled, prohibiting the entrance of negroes into the cars, constitutes a good defence. A corporation created for the carriage of passengers, however, cannot refuse arbitrarily to carry any man or class of men, without laying itself open to an action for damages. *Goines vs. McCandless*, 4 Phila., 255. 5. A trust to protect citizens of African descent in the enjoyment of their civil rights, and to prevent discrimination against them, is valid. *Lewis' Estate*, 152 Pa., 477.

II. NEGLECT OF MASTER'S RIGHTS. While slavery was recognized, the master could take his slave, when he had absconded, in any state in the union, provided he used no more violence than was necessary to accomplish his object. He could have him removed under act of congress, on application to a federal judge or commissioner. *Comm. vs. Alberti*, 2 Parsons, 499.

III. NEGLECT TO ADMIT INTO PUBLIC SCHOOLS. Since the

Negroes—Continued.

act of June 8, 1881, school directors cannot deny a colored child admission on account of his color to a common school established by them for the separate instruction of white children, and assign him to a branch of said school in a neighboring building for the separate instruction of colored children. School directors and teachers may assign a child to such room and school as may be adapted to his grade, but shall not make any distinction on account of race or color in expending the public money. *Kaine vs. Comm.*, 101 Pa., 490. *Comm. vs. Davis*, 10 W. N., 156.

IV. NEGLECT TO RECEIVE AS GUESTS AT AN INN. Where a clerk, empowered to receive and provide for guests at an inn, refuses accommodations to a traveller by reason of his color, he will be liable to indictment and punishment, under the act of congress of March 1, 1875. *U. S. vs. Newcomer*, 23 Pittsburg Journal, 131. 11 Phila., 579.

Newspapers.

I. NEGLECT BY PUBLISHING LIBEL. 1. In a prosecution for libel, where the alleged libellous matter is a privileged communication, malice or negligence must be proved affirmatively, beyond a reasonable doubt, and cannot be inferred from the language alone of the matter published. Yet when an article is libellous *per se*, it is presumably malicious. *Stewart vs. Press Co., Idem*, 247. *Comm. vs. McClure*, 1 Pa. County, 207. 3 Lancaster Review, 104. *Comm. vs. Scott*, 3 *Idem*, 290. 2. A newspaper article, containing matter otherwise proper for publication, loses its constitutional privilege if it accompanies its statements with sensational embellishments, or deals in rumors and insinuations. *Comm. vs. Murphy*, 8 Pa. County, 99. 3. If the jury find the absence of malice, negligence and recklessness in the publication complained of, they are bound to acquit the defendants. *Comm. vs. Winchell*, 3 Luzerne Law Times, N. S., 111. 4. Where the act of publication of a libel is both a public and a private wrong, the public and the person aggrieved have distinct and concurrent

Newspapers—Continued.

remedies, and the existence of an indictment does not preclude the jury from giving exemplary damages. *Barr vs. Moore*, 26 **Pittsburg Journal**, 61. 5. It is not libellous to publish the proceeding of a court of justice, without a malicious intent to injure character. *McLaughlin vs. McMakin*, *Brightly's Rep.*, 132. 6. Where newspaper comments and reports of interviews have been of so gross a nature as to be calculated to prejudice a jury against one of the parties to a cause and have been published during a trial, and presumably read by the jury during its recess, a new trial will be granted, where the verdict is against the party attacked. *Meyer vs. Cadwalader*, 29 W. N., 301. 7. If a printed article contains matter proper for public information, it is not a libel to publish it, if it is true, or, not being true, if it be not negligently or maliciously done. The term malicious libel, in the code of 1860, does not mean malicious in the ordinary sense of the term, but simply intentional, premeditated or designed. If the charges were made carelessly, recklessly and not from motives of good faith to the public, but from motives of personal gain, they would be malicious, and that they were true would be no defence. *Comm. vs. Moore*, 2 *Chester Co.*, 358. 8. A newspaper publication may give, as current news, such matters as involve open violation of law, or public conduct of such a character as to justify police interference, without rendering it liable for a civil action for libel, even though such publication may reflect upon the actors, and tend to bring them into public disgrace or contempt. *Urban vs. Pittsburg Times*, 1 **Mona-ghan**, 135. 9. A newspaper has the right to publish a full and fair account of a great crime ; to describe its incidents and name its perpetrator. If the publisher, after a careful, honest and thorough investigation, and without either malice or negligence, erroneously charges an innocent man with the offence, he, the publisher, cannot be punished therefor criminally. The account must not, however, contain a reference to old charges not in any way connected with the new crime, nor proper for public information. *Comm. vs. Telford*, 32 **Pittsburg Journal**,

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422. 10. In a civil action for libel, when the publication referred to an interview with the plaintiff and justification was pleaded, it was error to refuse to instruct the jury, that if they believed the article was truthful, the verdict must be for the defendant. A communication, to be privileged, must be upon a proper occasion, for a proper motive, and based upon reasonable or probable cause; when so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel, but actual malice must be proved. *Briggs vs. Garrett*, 111 Pa., 404. *Press Co. vs. Stewart*, 119 Pa., 584. 11. In an action on the case for libel against the proprietors of a newspaper, it is no defence to the action that the article was written by an employee of the defendant, acting within the scope of his employment, and that the defendants first acquired knowledge thereof after publication. The defendants in such case are, in law, held to have committed the act through their agent, and cannot claim exemption from the legal consequences, whether the wrong resulted from mere negligence, or from wilful, wanton intent by the agent. *Bruce vs. Reed*, 104 Pa., 408. 12. Any publication, injurious to the social character of a person, and not shown to be true, or to have been justifiably made, is actionable as a malicious libel. *Collins vs. Publishing Co.*, 152 Pa., 187. *Jackson vs. The Times*, *Idem*, 406. 13. The newspaper press, in making statements which reflect upon the personal character and integrity of individuals, are bound to exercise the greatest diligence in ascertaining, by reliable testimony, the truth of what they print. The neglect of that duty is the negligence intended by the constitution. *Comm. vs. McClure*, 3 W. N., 58. *Struthers vs. Bulletin*, *Idem*, 215. 14. In order to secure a conviction for libel, the commonwealth must satisfy the jury: (1) That the defendant published the libel. (2) That the matter published was libellous. (3) That it referred to the person and conveyed the insinuations charged in the indictment. If a defendant publish an article, it is immaterial that he did not write it. The

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truth is only to be published with good motives and for justifiable ends. *Comm. vs. Meeser*, 1 Brewster, 493.

15. Where a matter is proper for public investigation or information, the mere fact that what is said about it is false does not necessarily make the publication a criminal libel. If made in good faith, and not maliciously or negligently, such a publication is privileged. Newspaper publishers have no right, recklessly, to publish defamatory matter, though coming from a distant correspondent, without making some investigation as to its accuracy. *Comm. vs. Mellon*, 29 W. N., 433.

16. The essence of the offence consists in the malice of the publication, or the intent to defame the reputation of another. But where a person consents to become a candidate for public office conferred by a popular election, he puts his character in issue as to his fitness and qualifications for office, and the publication of the truth on this subject, with the honest intention of informing the public, is not libel. *Comm. vs. Odell*, 3 Pittsburgh, 449.

17. It is not an indictable offence to publish in good faith, for the information of the public, defamatory matter believed to be true, and which relates to any subject of general interest, the discussion of which is proper for public information. *Comm. vs. Paschall*, 8 Lancaster Review, 37.

18. An article published in a newspaper detailing some private scandal, relating to a person not in a public position who has not been charged before a magistrate with any offence, is libellous *per se*. *Comm. vs. Place*, 153 Pa., 314.

19. A publication concerning a public officer, no matter how much the defendant may be shown to have been actuated by malice, if the publication be true, he is justified thereby and cannot be convicted. *Comm. vs. Reed*, 2 Luzerne Register, 251.

20. There must be proof of malice or negligence to convict a person of libel, when the publication relates to the official conduct of officers or men in public capacity. *Comm. vs. Singerly*, 15 Phila., 368. *Comm. vs. Willard*, 9 W. N., 524.

21. To secure a conviction for libel, the commonwealth must satisfy the jury: (1) That defendants published the

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article. (2) That it was libellous. (3) That it referred to the person complaining. Publication injurious to the reputation of a private citizen in order to be privileged must be : (1) Matter proper for public information and investigation. (2) Not maliciously made. (3) Not negligently made. Legal malice must be inferred when it is published wilfully and without cause. The proprietor of a journal is responsible for the acts of his subordinates. If the defendant show that he has acted in good faith, it will save him from vindictive damages. *Comm. vs. Warfel*, 5 Lancaster Review, 113. *Regensperger vs. Kiefel*, *Idem*, 186. *Stoner vs. Hoffer*, *Idem*, 325. 22. A privileged communication is one made upon a proper occasion, from a proper motive, and based upon reasonable or probable cause, and also perhaps in a proper manner. *Briggs vs. Garrett*, 111 Pa., 404. *Conroy vs. Times*, 139 Pa., 334. 23. The circumstances which induced the publication of an alleged libel, may be shown in mitigation of damages. *Donnelly vs. Swain*, 2 Phila., 93. 24. It is not a privileged communication nor a report of a judicial proceeding, for a newspaper to publish a false rumor that one of the witnesses in a case had been arrested and imprisoned for giving false evidence. *Godshalk vs. Metzgar*, 23 W. N., 541. 25. Written or printed words which are injurious to a person in his office, profession or calling, or which impeach the credit of a merchant or trader by imputing to him insolvency, or even embarrassment, are libellous. *Hayes vs. Press Co.*, 127 Pa., 642. 26. Where one published words which injured the reputation of another, he assumed the consequences naturally resulting therefrom, and the question whether he acted maliciously or not should not be left to the jury unless the occasion be privileged. If it be a privileged communication, and there is no evidence of malice, it is the duty of the court to direct a nonsuit. Malice is an essential element in an action for libel, but it is malice in a special and technical sense, which exists in the absence of lawful excuse, and where there may be no spite or disposition to injure others. Whenever a wilful and unprivileged communication is made,

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having the other qualities of a libel, legal malice may be inferred. *Neeb vs. Hope*, 111 Pa., 145.

II. NEGLIGENCE IN SELLING. Selling Sunday newspapers on Sunday is a performance of wordly employment prohibited by the act of April 22, 1794. *Comm. vs. Matthews*, 152 Pa., 166.

III. NEGLIGENCE OF EMPLOYEE. If the proprietors of a newspaper give to an employee charge and control of an editorial column, reserving no supervision, and he, without their knowledge, write and publish a libel, they are responsible for the wrong, whether it result from mere negligence or from a wanton or reckless purpose. *Bruce vs. Reed*, 1 Lancaster Review, 104.

IV. NEGLIGENCE TO INSERT ADVERTISEMENT. In an action against the publishers of a newspaper, for neglecting to insert an advertisement of a public sale of real estate, for which they received payment in advance, the measure of damages, in the absence of fraud, is the amount paid to them for the publication of the advertisement. They are not liable to speculative damages. *Eisenlohr vs. Swain*, 35 Pa., 107.

New Trials.

I. NEGLIGENCE IN MOTION FOR. 1. A motion for a new trial is too late when not made for several months after the verdict. Nor could it be done, with a judgment standing in full force. *Syracuse Oil Co. vs. Carothers*, 63 Pa., 379. 2. The courts of common pleas have discretionary power to permit a motion for a new trial to be filed *nunc pro tunc* at any time within the term at which the judgment was rendered. *Lance vs. Bonnell*, 105 Pa., 46. 3. In a criminal case, the motion should be made immediately after the rendering of the verdict. *Comm. vs. Cannon*, 13 Phila., 456.

II. NEGLIGENCE TO GRANT. 1. The granting or refusing a new trial in a criminal case is a matter within the discretion of the court below, and is not the subject of review on a writ of error. Alleged misconduct of the jury furnishes no

New Trials—Continued.

exception to this rule. *Alexander vs. Comm.*, 105 Pa., 2.

2. A new trial will not be granted on the ground of absence of counsel at the trial, unless it is shown clearly that a different aspect would have been presented if counsel had been present. *Brock vs. Richardson*, 9 Phila., 233. *Rauck vs. Morton*, 5 Luzerne Law Times, N. S., 111. 3. A new trial will be granted, when the court considers the weight of evidence against the finding of the jury. *Buggy vs. Welling*, 5 Phila., 365. 4. To justify the granting of a new trial, it should appear either that the verdict was wrong on the evidence actually given, or there is a reasonable probability that light will be thrown upon the case, if tried again, which could not have been produced at the former trial. Absence of counsel at the time of a trial is not a ground for a new trial. *Busick vs. Shaw*, 7 Phila., 91. *Meyer vs. Smith, Idem*, 105. *Wetherill vs. Hanley*, 3 W. N., 473. *Loucheim vs. Henzey*, 9 W. N., 571. 5. The supreme court will not consider an assignment of error to the refusal of the court below to grant a new trial, even where the case was tried without a jury. *Comm. vs. R. R.*, 165 Pa., 45. *McKenney vs. Fawcett*, 138 Pa., 344. 6. A new trial will not be granted on the ground of after-discovered impeaching evidence, unless it is so inconsistent with the testimony of a witness as to induce the belief that it should produce a different result if the case were re-tried. *Comm. vs. Robins*, 7 Kulp, 108. 7. Granting new trials does not depend upon the whim or caprice of the judge, but upon well-settled and fundamental principles of law. It cannot be granted to admit evidence merely cumulative, which was within the reach of the party at the trial. It will only be granted to let in evidence which would require a different verdict. *Comm. vs. Schoeppe*, Leg. Gaz. Report, 450. *Comm. vs. Yol Sing*, 7 Kulp, 349. *Comm. vs. Rose*, 1 York Record, 125. *Marsh vs. Moser*, 1 Woodward's Decisions, 218. 8. The production of merely cumulative evidence is no ground for a new trial; nor will it be granted because of the inadequacy of damages. *Comm. vs. Seybert*, 4 Kulp, 4. *McDougall vs. Canal Co., Idem*, 304.

New Trials—Continued.

9. A new trial will not be granted to help the negligence of a party to cure his mistake, or to give him the opportunity of urging on a second trial what he ought to have brought forward on the first. Nor where the court erroneously rejected evidence, which ought not, if received, to have produced a different verdict. *Comm. vs. Irwin*, 1 Clark, 344. *Knox vs. Work*, 1 Browne, 101. 10. In order to justify a new trial on the ground of after-discovered evidence, it must show that it could not have been discovered by the exercise of reasonable diligence, or, if known, that it could not have been produced at the trial. It must also be shown that the new evidence would likely occasion a different result. *Comm. vs. Volkavitch*, 5 Kulp, 75. *Stanton vs. Kemmerer, Idem*, 114. *Machell vs. Anderson, Idem*, 433. *Norton vs. Breitenbach*, 1 Pearson, 467. 11. A new trial will not be granted in a criminal case merely because the court entertains a doubt as to the correctness of the verdict; but where the court doubted as to the propriety of the conviction, and there were gross irregularities and defects in the record, a new trial was granted. *Comm. vs. Weathers*, 6 Kulp, 486. 12. A new trial will not be granted on the ground of newly-discovered evidence which does not relate to new facts, but goes only to corroborate the testimony given at a former trial, or which consists merely of cumulative facts. Of all reasons presented for a new trial, there is none which will be more closely scrutinized by the court than that which alleges the existence of after-discovered evidence. *Comm. vs. Williams*, 2 Ashmead, 69. 13. The absence of a party to the suit at the trial is not a ground for a new trial, without clear proof that his presence is essential, and this must be shown when the case is called for trial. *Cowperthwaite vs. Miller*, 2 Phila., 219. *Rauk vs. Morton*, 5 Luzerne Law Times, N. S., 111. *Yerkes vs. Rodrock*, 15 W. N., 315. 14. Where the verdict of the jury was not altogether against the evidence, but is warranted by any portion of the testimony, the court, though believing the verdict is against the weight

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of evidence, is not at liberty to set it aside for the purpose of granting a new trial. *Deysher vs. Hilsinger*, 2 Woodward's Decisions, 153. *Brown vs. R. R., Idem*, 144. *Becker vs. Maurer, Idem*, 264. *Keim vs. Maurer, Idem*, 412. 15. A new trial will not be granted, where the verdict turned upon the question of the credibility of a witness. *Fell vs. Fortner* 3 Delaware Co., 568. *Comm. vs. Bellis*, 1 Northampton Co., 46. 16. The refusal of the court below to grant a new trial cannot be made the subject of an assignment of error. Capital cases are no exception to the rule. *Gray vs. Comm.*, 101 Pa., 380. *McGinnis vs. Comm.*, 102 Pa., 66. *Stokes vs. Burrell*, 3 Grant, 241. *Venango Oil Co. vs. Lewis*, 18 Pittsburg Journal, 37. 17. A new trial will not be granted, where it is not likely that a different result will be reached. *Harvey vs. Harvey*, 9 Luzerne Register, 194. 18. A new trial will not be granted on the ground of after-discovered evidence when it is merely corroborative of what has been given before. *Hicks vs. Lirne*, 2 Pearson, 156. 19. The application for a new trial must be made in proper time, or the motion will not be heard, even if there be after-discovered evidence. New reasons should not be presented after argument. *Kensington Bank vs. Little*, 7 W. N., 406. *Burkman vs. Albert*, 9 Lancaster Bar, 17. 20. Where a verdict is rendered against the binding instructions of the court, it is the duty of the court to grant a new trial, even if the instructions were erroneous. A new trial may be granted for the misconduct of counsel in arguing the case to the jury. *McDade vs. Campbell*, 12 Luzerne Register, 125. *Sweeney vs. R. R., Idem*, 223. *Larkin vs. Glover Co.*, 2 Delaware Co., 290. 21. Where there was evidence to support the verdict, and there is neither corruption nor manifest mistake shown, a new trial will not ordinarily be granted, although the weight of the evidence appeared to the court upon the trial to be contrary to the finding of the jury. *Moll vs. Zimmerman*, 1 Woodward's Decisions, 501. 22. After-discovered evidence will not warrant the granting of a new trial, where it is merely

New Trials—Continued.

cumulative, or does not go to the merits of the case, but merely to discredit a witness on the former trial, nor where such evidence could have been produced on the trial by the exercise of due diligence. *Ruddy vs. Ruddy*, 6 Kulp, 297. *Benedict vs. Coal Co., Idem*, 221. *Comm. vs. Brown*, 7 Kulp, 103. 23. On a proper case, the court will entertain a motion for a new trial after the expiration of the four days allowed from the rendition of the verdict. But to entitle the party making such motion to the interposition of the court, he must appear to have been guilty of no laches. *Winslow vs. Brenneman*, 1 Pittsburg, 416. 24. Surprise is no ground for a new trial, nor is want of recollection, nor cumulative or corroborative evidence merely. *Winton vs. Savage*, 4 C. P. Reporter, 47. 25. A new trial on the ground of after-discovered evidence will not be granted unless the new evidence affords sufficient ground for believing the verdict rendered under the old was erroneous. *Wolfinger vs. Fenton*, 2 Phila., 19.

III. NEGLIGENCE TO PRESENT POINTS. 1. The court will not grant a new trial on the ground of a claim, which the party might have brought forward at the trial, but did not. *McDermott vs. Ins. Co.*, 3 S. & R., 604. *Peters vs. Ins. Co., Idem*, 25. 2. Where substantial justice has not been reached, the court will grant a new trial on a point not seen or taken at the trial. *Maloney vs. Mintzer*, 6 Phila., 221.

Non Pros.

NEGLECT TO TAKE OFF. A *non pros* entered through the negligence of attorney will not be taken off after the lapse of three years. *Baxter vs. Seeley*, 10 W. N., 208.

Nonsuit.

I. NEGLIGENCE IN GRANTING. A nonsuit should never be granted, where there is any evidence sufficient to justify the inference of the disputed facts on which the right to recover rests. *Hill vs. Trust Co.*, 108 Pa., 1.

II. NEGLIGENCE IN ORDERING. A peremptory nonsuit is in

Nonsuit—Continued.

the nature of a judgment for the defendant on demurrer to evidence; and if there is any evidence more than a mere scintilla, which would justify an inference of the disputed fact upon which the plaintiff's right to recover depends, it must be submitted to a jury. *Jacques vs. Fourthman*, 137 Pa., 428.

III. NEGLECT IN REFUSING. A plaintiff may suffer nonsuit at any stage of the case before verdict in a common law action, and it is error in the court to refuse it. This is true, notwithstanding there is an issue upon a plea of set-off. Even where a jury has returned into court to give their verdict, but before it is rendered, a nonsuit may be suffered. *Haviland vs. Fidelity Co.*, 108 Pa., 243.

IV. NEGLECT IN TAKING OFF. A nonsuit entered by default may be taken off even three years after entry, where cause for its removal appears; such action lies within the sound discretion of the court, and is not reviewable by writ of error. *Zebley vs. Storey*, 8 W. N., 212.

V. NEGLECT OF MOTION TO STRIKE OFF. An application to strike off a nonsuit made six years after its entry, is too late. *Ribbert vs. Jackson*, 5 C. P. Reporter, 59.

VI. NEGLECT OF PLAINTIFF TO APPEAR. It is only when the merits have been passed upon, or from the course of pleadings and trial, might have been passed upon, that a judgment bars a subsequent suit. *Haws vs. Tiernan*, 53 Pa., 192.

VII. NEGLECT OF RULE TO TAKE OFF. Where a writ of error was taken to a judgment of nonsuit, and the record of the court below failed to show that a rule had been obtained and discharged to take off such nonsuit, the writ was held to be premature. *Handley vs. R. R.*, 10 W. N., 8.

VIII. NEGLECT TO DIRECT. A refusal to direct a nonsuit to be entered is not the subject of review on a writ of error. *Negley vs. Lindsay*, 67 Pa., 226. *Ballentine vs. White*, 77 Pa., 20. *Kelly vs. Bennett*, 25 W. N., 368. *Mobley vs. Bruner*, 59 Pa., 481. *Easton Borough vs. Neff*, 102 Pa., 474. *Lower Prov. Ins. Ass'n vs. Weitzel*, 4 Montgomery Co., 55.

Nonsuit—Continued.

IX. NEGLIGENCE TO ENTER. 1. It is the province of the judge to determine the law, and no legal evidence being offered to support the suit, it is his duty to direct a nonsuit, for it would be nugatory to send such case to a jury. *Morgan vs. Stell*, 5 B., 324. 2. Error does not lie either to the entry of a compulsory nonsuit, or to the refusal to enter such judgment; it lies only to the refusal of the court to take off the nonsuit. *Scranton vs. Barnes*, 147 Pa., 465.

X. NEGLIGENCE TO GRANT. 1. The conscience of the judge must be satisfied of the sufficiency of the evidence if believed. If it be too vague, uncertain or doubtful, to establish the equity set up, it is his duty to withdraw it from the jury by a nonsuit or a binding instruction in his charge, as the case may require. *Faust vs. Haas*, 73 Pa., 300. 2. The court will refuse a nonsuit, where the application is made after the jury have agreed upon and sealed their verdict, but before they have formally announced it. *Newton vs. Singlob*, 5 Pa. County, 151. 3. Under the act of assembly, only the plaintiff who is nonsuited can take a writ of error; the defendant can take none for refusal to order a nonsuit. *Pownall vs. Steele*, 52 Pa., 446.

XI. NEGLIGENCE TO MOVE FOR. It is not too late, even after the jury have returned to the box, to ask for a nonsuit. *Easton Bank vs. Coryell*, 9 W. & S., 153.

XII. NEGLIGENCE TO ORDER. 1. Where there is not sufficient evidence of negligence to submit a case to a jury, the court may so instruct a jury or may grant a nonsuit. *Penna. R. R. vs. Fries*, 7 W. N., 433. 2. When the evidence is insufficient to warrant a finding of negligence, it is the duty of the court to order a nonsuit. It will be ordered if the plaintiff's testimony clearly shows his contributory fault. *Thirteenth St. Ry. Co. vs. Boudrou*, 92 Pa., 475.

XIII. NEGLIGENCE TO REFUSE. It is error to nonsuit a plaintiff who has made out a case for the jury, but is not error to refuse a nonsuit, for when the defendant has given his evidence he has it still in his power to ask the court to instruct

Nonsuit—Continued.

the jury upon the insufficiency of the plaintiff's evidence to maintain the action. *Lehman vs. Kellerman*, 65 Pa., 491.

XIV. NEGLECT TO REMOVE. Where counsel has been misled by the action of the court, a nonsuit will be taken off. *Handley vs. R, R.*, 3 Luzerne Law Times, N. S., 207.

XV. NEGLECT TO SUFFER. The judge cannot compel a plaintiff, who has given evidence in support of his case, to suffer a nonsuit. *Irving vs. Taggart*, 1 S. & R., 360.

XVI. NEGLECT TO TAKE OFF. 1. When a refusal to take off a nonsuit is the ground of a writ of error, motion should be first made in the court below to take it off, or the writ will be quashed. *Adams vs. Adams*, 1 W. N., 279. 2. Where a nonsuit is entered in the court below, a writ of error lies only to the refusal of the court in *banc* to take it off. A writ of error directly to the judgment of nonsuit will be quashed. *Haverly vs. Mercur*, 78 Pa., 238. 3. A voluntary nonsuit is the action of the plaintiff himself; by it he takes the case out of court. The suit will not be reinstated on a motion to take off the nonsuit. *Slocumb vs. Hunsicker*, 8 Montgomery Co., 78.

Notary Public.

I. NEGLECT IN APPOINTING. The office of notary public in Europe is held in the highest repute, and is semi-judicial in its nature. Evils exist in this state from the large numbers of utterly inefficient notaries that have been appointed. *Comm. vs. Barrett*, 6 W. N., 384.

II. NEGLECT IN CERTIFICATE. 1. A notary cannot, by a new certificate, supply an accidental omission in the first certificate. *Enterprise Transit Co.'s Appeal*, 103 Pa., 492. 2. The certificate of a notary, like that of a judge or justice of the peace, is a judicial, not a ministerial act. The presumption is that he took the acknowledgement on reasonable information, and discharged his full duty. The burden of proof is on the plaintiff to prove a clear and intentional declaration of duty. *Comm. vs. Haines*, 97 Pa., 228. 3. A notary public may be compelled to testify against the truth of his certificate of pro-

Notary Public—Continued.

test, where he does not subject himself to answer criminally for official misconduct. *Parry vs. Almond*, 12 S. & R., 284.

III. NEGLIGENCE OF DEMAND AND NOTICE. The giving notice to endorsers is the official duty of a notary, and when duly certified, and not contradicted or questioned, is deemed to have been given according to law. *Browne vs. Bank*, 6 S. & R., 484. *Kase vs. Getchell*, 21 Pa., 506.

IV. NEGLIGENCE OF PROTEST OF NOTE. The official character of a notary extends only to the protest, and not to the hunting up of the parties. Neither he nor the bank is bound to know any one in the transaction, but the last endorser. He will be excused, if it appear, that, in the absence of specific instructions, he had pursued the usual course. A notary is not bound to know the residence of those on whom he is to call. Directions should be left at the bank for them. *Bellemire vs. U. S. Bank*, 4 Wh., 113. *Bennett vs. Young*, 18 Pa., 263.

V. NEGLIGENCE OF POWER. A notary may have an office in the county in which he is commissioned to reside, but not elsewhere. He may demand payment of a note, protest it for non-payment, and serve notices not only anywhere within the state, but outside of it also. He may serve notices personally or by mail, and may go or send into several counties or states; otherwise it might require several notaries to protest a note. The holder of a note can make demand and protest anywhere, but the advantage of having a notary is that his official certificate is *prima facie* evidence of demand, refusal and notice of dishonor. *Davey vs. Ruffel*, 14 Pa. County, 275.

VI. NEGLIGENCE TO AFFIX HIS SEAL. The attestation of a notary public is invalid, unless accompanied by his notarial seal. *Horstman vs. Kaufman*, 7 W. N., 487.

VII. NEGLIGENCE TO DEMAND PAYMENT OF NOTE. By virtue of his office, it is no part of the duty of a notary to present a note for payment or serve notice of its dishonor. His official act is the attestation of something done which makes it legal evidence. A notary is not bound to know the residence of the parties on a note. It is the duty of the holder to inform him.

Notary Public—Continued.

If proper demand be not made, owing to a want of information, and the endorser be released, the endorser is not thereby guilty of negligence. *Vandewater vs. Williamson*, 6 W. N., 350. 13 Phila., 140.

Notice.

I. NEGLECT IN CERTAINTY. Notice, to affect a party, must not be vague, but certain, not by loose conversation, but by direct information. It must be of an accomplished fact, not of an intent to do an act. *People's Bank vs. Etting*, 17 Phila., 233.

II. NEGLECT IN DATE OF GIVING. The general rule as to computation of time is, that when a statute allows a given number of days to do an act, the day on which the rule is taken or the decision made is excluded. *Cromelien vs. Brink*, 29 Pa., 524. *Duffy vs. Ogden*, 64 Pa., 240.

III. NEGLECT IN GIVING. 1. Notice to an attorney or agent in a particular transaction, given in the course of that transaction, is notice to the principal. *Bigley vs. Jones*, 34 *Pittsburg Journal*, 140. 2. An advertisement of the sale of property in a newspaper and by handbills, unknown to the party sought to be affected by it, does not amount to notice. *Weaver vs. Craighead*, 104 Pa., 288.

IV. NEGLECT IN SERVICE. It seems that parol service of notice is not good, if given to any one but the party to be notified in person. *Barnes vs. Wright*, 2 Wh., 193. *Jones vs. Shawhan*, 4 W. & S., 264.

V. NEGLECT OF FORM. Wherever notice is required under an act of assembly, written notice is to be understood. *St. Michael's Church vs. Philadelphia*, 4 Clark, 150. *Idem vs. County*, Brightley's Rep., 121.

VI. NEGLECT OF INQUIRY. 1. When inquiry becomes a duty, the party who neglects to perform it is affected with constructive notice of all the facts that probably would have been brought to light had it been duly made. *Roos vs. Connell*, 7 Kulp, 113. *Johnston's Appeal*, 4 W. N., 80. 2. Whatever puts a party

Notice—Continued.

upon inquiry amounts to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, when the inquiry, if pursued, would lead to knowledge of the requisite facts, by the exercise of ordinary diligence and understanding. *Cohen's Appeal*, 11 *Luzerne Register*, 13. 2 *Kulp*, 1. *Arthurs vs. Bascom*, 19 *Pittsburg Journal*, 9. *Parke vs. Neely*, 90 Pa., 52. *Hottenstein vs. Lerch*, 104 Pa., 454. *Maul vs. Rider*, 59 Pa., 171. *Jacques vs. Weeks*, 7 W., 264. 3. Whatever is sufficient to put the purchaser upon inquiry, which would necessarily have led him to a discovery, or knowledge of the adverse claim, or interest to or in the land, is sufficient to affect him with notice of it. *Farley vs. Stokes*, 1 *Parsons*, 422. *Walsh, vs. Stille*, 2 *Parsons*, 17. 4. Where inquiry becomes a duty, the party who neglects to perform it should be visited with at least constructive notice of the facts that probably would have been brought to light if it had been duly made. *Leonard's Appeal*, 94 Pa., 168.

VII. NEGLIGENCE TO ACCEPT. 1. A purchaser will be affected by information derived from a person interested and from a source likely to gain credit, although not the party or his agent. Vague reports of strangers or information from one not interested will not affect a purchaser with notice. *Mulliken vs. Graham*, 72 Pa., 484. 2. Implied or constructive notice is only effectual to charge a purchaser or mortgagee when the circumstances are such that a failure to obtain the knowledge would be gross and culpable negligence; notice from an unauthorized party is mere rumor. *Phillipsburg Bank's Appeal*, 10 W. N., 265.

VIII. NEGLIGENCE TO ADMIT. A notice containing matter foreign to its professed object, calculated to prejudice the other side, is not admissible in evidence. *Bush vs. Ferry*, 7 *Phila.*, 195.

IX. NEGLIGENCE TO ASSUME. Notice or knowledge will be assumed, where the circumstances are such that the municipal authorities, by the exercise of proper and reasonable diligence, might have known the defect which caused the damage com-

Notice—Continued.

plained of. *Kibele vs. Philadelphia*, 32 *Pittsburg Journal*, 361.

X. NEGLECT TO GIVE. 1. Inquiry is always a duty, where notice is not actual or constructive, and where it is a duty and is omitted, the party will be regarded as having notice; that is to say, he will be considered as one who intends to take the risk of the *status* of things. *Aldrich vs. Bailey*, 71 Pa., 255. 2. Whatever is sufficient to put a party on inquiry which would result in the information sought, is equivalent to notice. *Angier vs. Schieffelin*, 72 Pa., 106. 3. Where A allows B to represent to the world that he, B, is the sole owner of the property, A cannot prevent such property from being held liable for B's debts. *Callender vs. Robinson*, 28 *Pittsburg Journal*, 235. 4. Positive acts tending to mislead one ignorant of the truth, which do mislead him to his injury, are good ground of estoppel. Silence will postpone a title, when one knowing his own right should speak out. One led by such silence to rest on his title, believing it secure and to expend money and make improvements without timely warning, will be protected by estoppel. *Chapman vs. Chapman*, 59 Pa., 214. 5. The legislature may provide for serving notice on parties out of the state, interested in litigation in the state, and in default of appearance adjudicate on the interest. *Comm. vs. Dillon*, 61 Pa., 488. 6. The notice to bind a *bona fide* purchaser of negotiable paper, must be actual notice. *Lis pendens* does not apply to such a case. *Day vs. Zimmerman*, 3 Lancaster Bar, No. 8. 7. Notice is required to a man who acts *bona fide*, not to him who wilfully uses that to which he pretends no title. If a person has allowed parties the use of his property, he should warn them of his intention to recall his permission. *Kay vs. Penna. R. R.*, 65 Pa., 269. 8. Letters properly directed and duly mailed are sufficient evidence of notice of the dishonor of bills or non-payment of negotiable notes. It establishes no such legal conclusion in other business relations, though it is a step towards proving actual notice. *Kenney vs. Altvater*, 77 Pa., 38. 9. Occasional newspaper advertise-

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ments to absent people amount to nothing as a means of notice. *Nickerson vs. Nickerson*, 13 W. N., 212. 10. Where a party has notice of such facts as should have put him on inquiry, and which, by the exercise of ordinary diligence would have led to full knowledge, then he had constructive notice of the facts, which the law regards as equivalent to actual notice. *Overdeer vs. Updegraff*, 69 Pa. 118. 11. Notice to an agent, bound, in the discharge of his duty, to act upon it and to communicate it to his principal, is notice to the principal. *Philadelphia vs. Lockhart*, 73 Pa., 211. 12. Where there is no evidence of fraud, misrepresentation or concealment on the part of the vendor, the constructive notice which the record of a judgment lien, standing in the line of the vendor's title, gives to the vendee, is as effective as actual notice. *Stephens' Appeal*, 87 Pa., 202. *Boyd vs. McCullough*, 137 Pa., 7. 13. Anything sufficient to put a party on inquiry is notice of whatever such inquiry would reveal. *West Branch Canal Co.'s Appeal*, 81x Pa., 19.

XI. NEGLECT TO HEED. It is the duty of purchasers of real estate to make inquiry respecting the rights of parties in possession, and failing to do so, they are affected with constructive notice of such facts as would have come to their knowledge in the proper discharge of that duty. *Jamison vs. Dimock*, 95 Pa., 52.

XII. NEGLECT TO OBSERVE. If parties are perfectly aware of what is done in a case in the orphans' court, in which they are directly interested, and remain silent, apparently acquiescing in the determination of the court, actual notice will be presumed. *Rittenhouse's Estate*, 1 Parsons, 313.

XIII. NEGLECT TO PRODUCE. Notice to produce a notice is unnecessary; every written notice should be proved by a duplicate original. *Morrow vs. Comm.*, 48 Pa., 307.

XIV. NEGLECT TO RECEIVE. A purchaser of a legal title is not affected by any latent equity, founded on trust, fraud, or otherwise, of which he had not actual notice; or which does not appear on the face of some deed, necessary in

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the deduction of titles, so as to amount to constructive notice. *Scott vs. Burton*, 2 Ashmead, 312.

XV. NEGLECT TO SEEK. A purchaser at sheriff's sale is bound by such facts as he would have learned by inquiry, if inquiry had become a duty. *Sill vs. Swackammer*, 103 Pa., 7.

Nuisance.

I. NEGLECT IN DEFINING. 1. The criterion of liability for a supposed private nuisance affecting bodily comfort, is whether the inconvenience is one materially interfering with the ordinary comfort of human existence. The mere fact that a factory manufactures necessary articles of trade, does not prevent it being a nuisance. *Bennington vs. Klein*, 1 Luzerne Law Times, 1. 2. There are many kinds of useful business, especially in a manufacturing community, which are not nuisances in themselves, but which become so in view of the circumstances or the neighborhood, in which it is proposed to establish them. There is a marked distinction between a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in close proximity to it, and that of a new erection threatened in such a vicinity. As a city extends, such nuisances should be removed to vacant grounds. *Weir vs. Kirk*, 21 *Pittsburg Journal*, 54.

II. NEGLECT IN STORING EXPLOSIVES. Where a storehouse for explosive materials is erected, and the court is satisfied that such building is needed and that it is well situated and in a tolerably isolated position, yet reasonably accessible, an injunction will not be issued against its maintenance. *Dilworth's Appeal*, 9 W. N., 133.

III. NEGLECT OF JURISDICTION TO ABATE. The ground of the jurisdiction of courts of equity, in cases of nuisance, is their ability to give a more complete remedy than is attainable at law, in order to prevent irreparable mischief, and to suppress vexatious litigation. But the *locus in quo* must be within the

Nuisance—Continued.

absolute jurisdiction of the court. *Moyamensing Commrs. vs. Long*, 1 Parsons, 143. *Morris vs. Remington, Idem*, 387.

IV. NEGLECT OF NOTICE TO REMOVE. Notice to remove a nuisance in order to sustain a city claim, must be given to the registered owner, and not merely to the reputed owner of the property. *Phila. vs. Laughlin*, 28 W. N., 306. *Idem*, 20 Phila., 350.

V. NEGLECT OF PERSONAL GRIEVANCE. One who is injured by a public nuisance, either in his person or his property, cannot have his remedy unless he can show a damage which is peculiar to himself, and different in kind and degree from that sustained by the general public. *Gold vs. Philadelphia*, 115 Pa., 184.

VI. NEGLECT OF RIGHT OF ACTION. The right of action for a private nuisance does not depend upon the number of people who may have suffered because of the offence, but upon the character of the act complained of and the injury sustained, and whether the plaintiff has suffered either in person, family or property in a manner differing from others. *Brunner vs. Schaffer*, 11 Pa. County, 550. 3 Northampton Co., 203.

VII. NEGLECT TO ABATE. 1. If machinery used in a factory, by its use so shakes the ground as to do actual injury to an adjoining building, by shaking down or cracking plastering or walls, the parties doing such injury are liable therefor. The general rule of law is, that one may not use his property so as to do injury to another; but this is subject to the qualifications, that he may use it in the ordinary way, or for such purposes as it is commonly used in that community. Thus, I am not liable for the smoke coming out of the chimneys of my dwelling, though it annoys my neighbor by throwing soot over him. *Bennington vs. Klein*, 6 W. N., 281. 2. An injunction will be granted to restrain the owners of a factory from burning refuse shavings and chips as fuel, thereby producing a dense smoke in a crowded part of the city. *Biddle vs. McCracken*, 13 W. N., 514. 3. A municipal corporation owning and holding property for public purposes, is liable

Nuisance—Continued.

to an adjoining owner for injuries arising from a nuisance maintained upon its property. In the present case, the nuisance consisted of a defectively constructed privy well, maintained upon city property for public school purposes. *Briegel vs. Philadelphia*, 135 Pa., 451. 4. A bowling alley, in use during the hours of the night usually devoted to sleep, may become a nuisance to the neighbors, and may be enjoined. *Briggs vs. Vottler*, 4 W. N., 272. 5. Undoubtedly the courts have jurisdiction to restrain public nuisances, under certain circumstances. But the power will be exercised only when the right is clear, and when the threatened injury is of a permanent or an irreparable character. The mere fact that there is a remedy at law by indictment or action will not alone prevent the exercise of that power. *Bunnell's Appeal*, 69 Pa., 62. 6. Equity will enjoin the running of a factory between certain hours, where it causes a noise and concussion to neighboring buildings. *Burke vs. Myers*, 10 W. N., 481. 7. The use of a steam boiler properly constructed will not be restrained as a nuisance by injunction, although situate in the dense part of a city. The apprehension of danger from it is not sufficient. Injury direct and inevitable must be shown. The ringing of the chimes of a church bell may be enjoined. *Carpenter vs. Cummings*, 2 Phila., 74. *Harrison vs. St. Mark's Church*, 14 W. N., 387. 8. Where a city ordinance defines the commission of certain acts to be nuisances and recoverable at the suit of the city and for its use, no one can institute an action in the name of the city without the authority of the proper city official. *City vs. Strawbridge*, 4 W. N., 215. 9. Ownership of property on a street gives the owner no right to restrain a nuisance on such street, except in the portion fronting his premises. The public authorities, however, can act. *Collins vs. R. W. Co.*, 32 W. N., 379. 10. Where a trial has taken place in a court of law on an indictment against a party for maintaining an alleged nuisance, and the party has been acquitted, a chancellor is justified in refusing to grant an injunction prayed for. *Comm. vs. Croushore*, 145 Pa., 157. 11. It is a

Nuisance—Continued.

public nuisance, for a party to store a large quantity of gunpowder and dynamite in a building near a public highway, to the damage of neighbors and the public. *Comm. vs. McLaughlin*, 120 Pa., 518. 12. While the continuance of a business, admitted to be a public nuisance, cannot be justified by the length of time it has been in operation, by the capital invested in it, or by its influence upon the prosperity of the community, yet, where the fact of its being a public nuisance is controverted, a jury must determine. The present case was one of oil refinery within city limits. *Comm. vs. Miller*, 139 Pa., 77. 13. The court may grant a preliminary injunction at the instance of the attorney-general to restrain the playing of base-ball on Sunday, where it was played in a public place, constituting a breach of the peace. *Comm. vs. Rothrock*, 2 Northampton Co., 249. *Comm. vs. Parks*, *Idem*, 213. 14. A common nuisance is anything that works hurt, inconvenience or damage to the public. One who maintains a business on the banks of the Schuylkill river in such a manner as to pollute it, is indictable. *Comm. vs. Soulas*, 16 Phila., 523, 525. 15. It is no defence to an indictment for a nuisance in a city that it has been conducted in the same place for a long series of years, as no nuisance can be justified by prescription. Nor will it be continued on the ground that it is connected with a flourishing establishment. A pig sty in a city is, *per se*, a nuisance. *Comm. vs. Van Syckle*, *Brightly's Rep.*, 69. 16. It is a public nuisance, indictable at common law, to place on the footway of a public street, a stall for the sale of wares, although the defendant pay rent to the owner of the adjoining property. *Comm. vs. Wentworth*, *Brightly's Rep.*, 318. 17. A slaughter house and pig pens in a village community are a nuisance, *per se*. *Comm. vs. Westcott*, 4 C. P. Reporter, 58. 18. If a nuisance cannot be abated without obstructing a right which has been granted, the exercise of the right may be stopped entirely, until means have been taken to reduce it within proper limits. A license to carry off surface water by means of a covered drain, does not authorize a party

Nuisance—Continued.

in conveying the contents of a filthy cesspool through the drain. *Crossland vs. Pottsville*, 126 Pa., 511. 19. A man has no right to bring a noisy trade or business into a neighborhood exclusively occupied by dwelling houses, affecting the peace and comfort of their occupants. *Dallas vs. Art Club*, 4 Pa. County, 340. 20. An action will lie for a continuing tortious act, affecting injuriously the property of another, although no appreciable damage result from it. In an action for a nuisance in obstructing the works of a company, it is no defence that the plaintiff's works were unskillfully constructed. *Del. Canal Co. vs. Torrey*, 33 Pa., 143. 21. Where, in a city, machinery is kept in motion during the night, disturbing the neighbors, an injunction may be applied for restraining work with its accompanying noise during certain hours. *Dillon vs. State*, 11 W. N., 18. 22. No man may trespass on another's right, and where the former verdict and judgment established the fact that the original obstruction was a nuisance, the plaintiff in a second action for a continuance of the nuisance is entitled to such punitive damages as will compel its abatement. *Ellis vs. Academy of Music*, 120 Pa., 609. 23. An injunction will be awarded restraining the operation of a bone-boiling establishment for manufacturing fertilizers, where it is situated in a populous neighborhood. *Evans vs. Fertilizing Co.*, 160 Pa., 209. 24. Every continuation of a nuisance is a ground for a new action. Tenants in common must in general sever in real actions, but in personal actions, as for trespass or nuisance to their lands, they may join, as the damages survive to all. *Fell vs. Bennett*, 110 Pa., 187. 25. Private citizens have no right of action for the suppression of a public nuisance, unless they aver and prove some special damage to themselves. *Flanagan vs. Philadelphia*, 8 Phila., 110. 26. An owner of a house who leases it to a tenant with a cesspool so situated and constructed on the premises, that its lawful use by the tenant must necessarily result in a nuisance to the occupants of an adjoining house, is liable in damages to the latter for such nui-

Nuisance—Continued.

sance. The tenant in such case, whose acts produced the nuisance, would also be liable for the result. *Fow vs. Roberts*, 108 Pa., 489. *Idem*, 3? **Pittsburg Journal**, 130. 27. If demised premises are so constructed or in such a condition, that the continuance of their use by the tenant results in a nuisance to a third person, the landlord, as well as the tenant, is liable to such third person. *Fow vs. Roberts*, 2 C. P. Reporter, 133. 28. The landlord is not liable for maintaining a nuisance injuring a neighbor, as a leaky privy well, where the damage results from the mode of use by the tenant, and not from the nature or construction of the premises. *Fow vs. Roberts*, 14 W. N., 307. 29. An injunction will be granted to prevent the defendants burning bituminous coal for generating steam in a building in the vicinity of dwellings, and thereby creating a nuisance. Irreparable injury to the reasonable and ordinary use of property by continuous hurtful acts amounting to a nuisance, when the evidence is clear, may be restrained by injunction. *Galbraith vs. Oliver*, 3 **Pittsburg**, 443. *Campbell vs. Schofield*, *Idem*, 78. 30. A nuisance may be continuous and repeated day by day, but the statute of limitations runs from the close of each day, and the indictment must charge the offence to have been committed within the statutory period. *Gise vs. Comm.*, 81 Pa., 428. *Comm. vs. Bartelson*, 85 Pa., 488. 31. Although a useful employment may produce discomfort and annoyance to those near by, yet it does not follow that it should be restrained. A court, exercising the power of a chancellor, whose arm may fall with crushing force upon the every-day business of men, should move with much caution. Brick-making being a useful and necessary vocation, the burning of bricks is not a nuisance *per se*. If a man lives in a town, he must submit to the consequences of the obligation of trades which are carried on in his neighborhood, which are actually necessary for trade and commerce. *Hackenstine's Appeal*, 70 Pa., 102. 32. The prolonged ringing of church bells at unseasonable hours, and in close proximity to rows of dwelling houses, will be restrained. The chimes and peals of church

Nuisance—Continued.

bells should be limited to moderate tolling and ringing on Sunday, before morning and evening service. *Harrison vs. St. Mark's Church*, 12 Phila., 259. 3 W. N., 384. 33. The construction and use of a cesspool or privy, the percolations from which contaminate the water in the well of an adjoining land owner, used for household purposes, is a nuisance *per se*, not justifiable on the ground of necessity. *Haugh's Appeal*, 102 Pa., 42. 34. A life tenant, whose premises have become untenable by reason of coke ovens wrongfully built on a street in front of his premises, is entitled to recover the entire rental value of the property during the time such ovens are maintained. *Herbert vs. Rainey*, 162 Pa., 525. 35. In case of a private nuisance, equity will not relieve by injunction where the right is disputed, until after a trial at law. Nor will a special injunction be granted, unless the injury is irreparable and the necessity pressing and there exists no adequate remedy at law. *Heiskell vs. Gross*, 7 Phila., 317. 36. A depreciation in the selling or rental value of real estate by reason of the establishment of a lawful but undesirable business in its vicinity, does not give a cause of action; nor does the fact that such business is a source of some personal discomfort and annoyance, so long as it is conducted in a lawful manner. To maintain an action for nuisance, it must be shown that the plaintiff has suffered a substantial injury because of an unlawful act or of an act of negligence on the part of the defendant in the conduct of the business. *Keiser Gas Co.*, 143 Pa., 276. 37. An owner of real estate cannot by leasing the same to a tenant, avoid liability to a third party for the continuance of a nuisance on the premises, such as a defectively constructed cesspool, which before such leasing it was his duty to abate. *Knauss vs. Brua*, 107 Pa., 85. 38. Where a noisy nuisance is complained of, the question is one of degree and locality. If the noise is slight and the inconvenience merely fanciful, a court of equity will take no cognizance of it; but if the noise is such as to destroy the comfortable enjoyment of one's home, the court will interfere to prevent its continuance. A man

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cannot bring a noisy business into a neighborhood exclusively occupied by dwelling houses ; if he does, the occupants of the adjoining houses may maintain an action for damages, or if the evil cannot be compensated by damages and occasions continual annoyances, a court of equity will prevent the continuance of the nuisance by a writ of injunction. *Ladies' Art Club's Appeal*, 22 W. N., 25. 39. The operation of a manufactory by day and night, in a city, which necessarily causes some noise and vibration in a neighboring dwelling, will not be restrained by injunction, where the evidence does not show that the noise constitutes a substantial and unjustifiable nuisance to the complainant. A person who resides in the centre of a large city, must not expect to be surrounded by the stillness which prevails in a rural district. Every noise is not a nuisance. *McCaffrey's Appeal*, 105 Pa., 257. 40. A court of equity has power to restrain and abate public nuisances. Where, however, the evidence is conflicting as to whether or not a nuisance exists, a chancellor will not interfere except in extreme cases where irreparable injury is threatened or being done, and prompt action is necessary to avert it. *McClain's Appeal*, 25 W. N., 246. 41. A steam laundry is not a nuisance *per se*. An injunction will not be granted to restrain its operation on the second floor of a house, because of annoyance caused by vibration and noise to the occupants of the first floor, whose business was not thereby interfered with or injured, nor were the employees injured in health. *Miller vs. Schindle*, 15 Pa. County, 341. 42. A bill in equity, praying for an injunction against an alleged nuisance, consisting of the percolation into the plaintiff's cellar of water from the defendant's premises, and for damages, should be dismissed when the source of the water indicates that such percolation results from natural causes, and not from any act or default of the defendant. *Mirkel vs. Morgan*, 134 Pa., 444. 43. Where a business complained of is a dangerous nuisance, and the injury is continuous and cumulative, and the mischief irreparable, a court of equity will enjoin

Nuisance—Continued.

the prosecution of such business. *Penna. Lead Co.'s Appeal*, 96 Pa., 116. 44. An injunction will not be granted to restrain the lessees of a theatre from loud noise in removing stage properties from the theatre building at a late hour at night, where it was shown to be necessary to their business. *Penrose vs. Nixon*, 140 Pa., 45. 45. Where the board of health of Philadelphia, after due notice to the owners or reputed owners to remove a filthy well, had themselves removed it and filed a municipal claim against the property for the expense incident to such removal, the lien was defective in not averring notice to the registered owner to abate the nuisance, and a non-compliance therewith. *Philadelphia vs. Dungan*, 124 Pa., 52. 46. While the board of health of Philadelphia has the power to declare and abate public nuisances, and may require privy wells to be cleaned and purified, yet it has no power to demand the construction of water closets and connections, so as to charge lot owners with the cost thereof upon a municipal claim for lien. *Philadelphia vs. Provident Trust Co.*, 132 Pa., 224. 47. When the defendants were engaged in a lawful business, in this instance operating a lead works and shot tower, in order to sustain an action for an injury resulting therefrom, the injury must be shown to be real and substantial, not a trifling annoyance, such as is necessarily incident to the business complained of. *Price vs. Grants*, 118 Pa., 402. 48. The remedies at law for nuisances are very ample. Those that are public may be removed by indictment, and such as are private may be redressed by an action on the case. And the party aggrieved by either a public or private nuisance, may also abate or remove it by his own act, so as he commits no breach of the peace, nor occasion, in the case of a private nuisance, any unnecessary damage. Jurisdiction in equity exists to restrain such nuisances as are threatened or in progress, and which cannot adequately be compensated for in damages. *Rhea vs. Forsyth*, 37 Pa., 506. 49. The courts have the power to restrain the erection of any structure intended for a purpose which will be a nuisance *per*

Nuisance—Continued.

se, such as pig-stys and bone-boiling establishments. They interfere probably with the health and certainly with the enjoyment of the surrounding residents. The rule is the same in regard to noises which prevent sleep. Injunctions are often granted for such causes. But there must be injury and damage both, to justify the remedy by injunction. If the injury be doubtful, eventual or contingent, equity will not interfere. Annoyance without damage will not suffice. If a man lives in a town, he must submit to the obligations of trades in his neighborhood which are necessary. Mere diminution in the value of property without irreparable mischief will not be ground for equitable relief, nor that the rates of insurance on neighboring buildings will be increased by the erection of the building complained of. *Rhodes vs. Dunbar*, 57 Pa., 274. 50. Equity will not interfere to restrain the use of bituminous coal in the manufacture of certain qualities of iron, where a necessity apparently exists for its use. The fact that the smoke and soot of a furnace is objectionable to the neighbors will not warrant an injunction, unless there is a wilful infliction of injury upon a neighbor or his property. Where damages will compensate the loss suffered by a nuisance, equity will not interfere. *Richards' Appeal*, 57 Pa., 105. 51. While the owner of property is without legal redress for the effect upon its desirability and market value of the mere proximity of an undesirable business, yet, if the business be so conducted as to affect the use of his property or the health of its occupants, these tangible injuries, capable of measurement by a pecuniary standard, will sustain an action for damages. *Robb vs. Carnegie*, 145 Pa., 324. 52. An injunction to restrain an offensive trade will issue, where the nuisance renders life uncomfortable, although it may not be injurious to health. *Roberts vs. Thomas*, 1 Delaware Co., 89. 53. A carpet-cleaning establishment and a stable connected therewith, maintained upon a street devoted to private residences, and rendering the adjoining dwelling uncomfortable by the dust, moths, noise and stench proceeding therefrom, will be enjoined as a nuisance on a bill filed

Nuisance—Continued.

by such neighbor. *Rodenhausen vs. Craven*, 141 Pa., 546.

54. Where an offensive trade, like a slaughter house, is carried on in a city near dwellings and places of business, an injunction may be applied for. *Schandein vs. Bach*, 11 W. N., 202.

55. A special injunction to restrain the erection of a proposed abattoir and slaughtering house will not be granted, where the affidavits do not establish the fact that they will be a nuisance. A Chinese laundry in a basement so conducted as to injure the trade of a party above stairs, may be a nuisance, as also the business of a gold-beater, set up in a quiet dwelling neighborhood, and by its noise interfering with the quiet enjoyment and perhaps safety of neighboring property. *Sellers vs. R. R.*, 10 Phila., 319. *Warwick vs. Lee, Idem*, 160. *Wallace vs. Auer, Idem*, 356. *Richardson vs. Oberholzer*, 2 W. N., 332. *Dill vs. Haugh*, 9 W. N., 417.

56. A court of chancery will take jurisdiction in case of nuisance at the instance of a private person, where he is in imminent danger of suffering a special injury, and his rights are directly affected by the nuisance. There are cases, where such court will grant an injunction without trial at law, where the business is carried on in the populous part of a city, which is injurious to the health, or annoying to parties residing in the vicinity. A slaughter house located near dwellings in a city will be enjoined. *Smith vs. Cummings*, 2 Parsons 93.

57. Parties who cause a nuisance by acts done on the lands of a stranger are liable for its continuance; and it is no defence, that they cannot lawfully enter to abate the nuisance, without rendering themselves liable to an action by the owner of the land. *Smith vs. Elliott*, 9 Pa., 345.

58. In an action for a nuisance, it is no defence, that the plaintiff rented the premises injured by the nuisance, with a knowledge of its existence, and for a smaller rent on that account. Nor is it a defence, that the business occasioning the nuisance is necessary to be carried on and useful to the public. *Smith vs. Phillips*, 8 Phila., 10.

59. If a nuisance arose wholly from the nature of rented premises, the owner and not the tenant would be liable in damages to a third party injured

Nuisance—Continued.

thereby. Where, however, the lease contained a covenant to keep the premises in good repair, and the tenant had failed to do so, he is liable. *Somers' Appeal*, 6 W. N., 441. 60. Mere discomfort, without substantial injury to property or business, suffered from the noise and vibration of machinery in a manufacturing locality, is not sufficient to justify the issuing of an injunction. *Straus vs. Barnett*, 140 Pa., 111. 61. Whoever, in the exercise of his business, occasions chronic discomfort to his neighbors, filling the air with noxious exhalations, must expect the intervention of some authority to keep the traffic within reasonable bounds. The existence of other nuisances in the same neighborhood furnishes no excuse for setting up an additional one. *Weiser's Appeal*, 3 **York Record**, 103. 62. The board of health has power to fence a lot to remove the cause of a nuisance, as where prohibited deposits are dumped upon the lot. An injunction will not be granted to restrain the action of the board, the owner having an adequate remedy at law. *Wistar vs. Addicks*, 9 Phila., 145. 63. An owner of property cannot escape liability for an existing nuisance thereon, by demising it to a tenant and putting him in possession. Where a cesspool injured adjoining property, as a result of leakage, the landlord will be responsible in damages, when the leakage was caused by improper construction, or by a defective condition, through lack of repairs existing when the tenant took possession. But the landlord will not be responsible, if the cesspool was properly constructed and was in good repair when the tenant took possession, and the leakage was due to the subsequent neglect of the tenant to keep it in repair. *Wunder vs. McLean*, 134 Pa., 334.

VIII. NEGLIGENCE TO CONSTITUTE. It is sufficient to constitute anything a nuisance, that a number of persons, are seriously annoyed by it. It is not necessary that all the neighbors should be affected, nor that it is detrimental to health. It is sufficient, that it offends the senses or disturbs the comfort of a number of persons. An industry that is a nuisance *per se*, must not be conducted in a populous district. No length of

Nuisance—Continued.

time can, in itself, legitimate a nuisance. *Comm. vs. Rush*, 11 Lancaster Review, 97.

IX. NEGLECT TO ENJOIN. 1. It is no defence to an indictment for a nuisance in a city, that it has been conducted in the same place for a long period of years, as no nuisance can be justified by prescription; nor that it has become necessary to the community in which it is situated. A pig sty is, *per se*, a nuisance. *Comm. vs. Van Sickle*, 4 Clark, 104. 2. An action for damages for maintaining a private nuisance is properly brought in a court of law. After the verdict of a jury establishing the fact that it was a nuisance, equity will interfere to prevent a continuance of it. *Crawford vs. Axle Co.*, 1 Chester Co., 412. 3. In the case of a private nuisance, equity will not relieve by injunction, where the right is disputed, until after a trial by law. Nor will a special injunction be granted in such a case, unless the injury is irreparable and the necessity urgent, and there is no adequate remedy at law. As a general rule, an action on the case affords a complete remedy. When, however, the injury is of a continuous nature, it may be restrained by injunction. *Hieskell vs. Gross*, 3 Brewster, 430. 4. A preliminary injunction, totally prohibiting the carrying on a certain business, is not allowed where the facts are in dispute and it is not a nuisance *per se*. *Mitchell vs. Evans*, 5 Kulp, 485. 5. Though a nuisance, threatening private damage that is imminent and irreparable, or is not capable of adequate compensation in money, may be enjoined in equity, yet a final injunction for that purpose will only be granted when the right is clear and the facts uncontested. *Mowday vs. Moore*, 133 Pa., 598. 6. Upon a bill in equity to restrain a public nuisance, if the matter complained of be not a nuisance *per se*, and the testimony be conflicting whether it is a public nuisance or not, an injunction will not be granted until after trial at law. *Newcastle vs. Raney*, 130 Pa., 546. 7. Injunction is the proper remedy for the prevention of trespasses and nuisances which threaten to become permanent. In such cases, it is no objection to the jurisdiction of a court of equity

Nuisance—Continued.

that the injured party may have a remedy at law. *Walters vs. McElroy*, 151 Pa., 549. 8. A lawful and useful business will not be restrained by injunction, merely upon the ground that the danger of fire to surrounding property is somewhat increased, and impurities are added to water already rendered unfit for use by other causes. *Young vs. Elkins*, 15 Phila., 27.

X. NEGLIGENCE TO OBJECT TO. A failure to remonstrate against the erection of a nuisance, will not be held an estoppel. *Burt vs. Smith*, 3 Phila., 363.

XI. NEGLIGENCE TO RESTRAIN. 1. To enable a private person to maintain a bill of equity for the prevention or remedy of a public nuisance, he must show that he will sustain a private injury, aside from the public inconvenience. *Blanchard vs. Reyburn*, 23 Pittsburg Journal, 3. 2. The use of a bone-boiling establishment in a populous neighborhood may be restrained by injunction. *Czarniecki's Appeal*, 35 Pittsburg Journal, 153. 3. Allegations in a bill, that defendant's works are located so as to emit noxious gases offensive to plaintiff and others, are sufficient to evoke the action of a court of equity. *Penna. Lead Co.'s Appeal*, 28 Pittsburg Journal, 203. 4. A mandatory injunction to abate a nuisance is a matter of grace, and will only be granted in cases of immediate and irreparable mischief. *Perry vs. R. R.*, 5 Lancaster Review, 158. 5. Equity will not interfere to restrain municipal authorities from creating a nuisance by the construction of a sewer, unless the injury is such as is not capable of adequate compensation by an action at law. When the plaintiff can abate the nuisance complained of by any lawful act of his own, equity will not interfere. *Reading Iron Works vs. South Chester*, 3 Lancaster Review, 107. 6. A business lawful in itself may become a nuisance by reason of the manner in which it is constructed; but the mere fact that such business annoys another, or renders his property less desirable and less profitable, will not of itself authorize the court to act by way of restraint. *Woodington vs. Bates*, 7 Montgomery Co., 173.

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Oil.

NEGLECT IN SELLING EXPLOSIVE MATERIAL. A dealer in petroleum or carbon oil is liable in damages for injury to a party by an explosion of such oil, where he has put it upon the market knowing it to be unsafe, explosive, dangerous, and unfit for illuminating purposes. A manufacturer who sells his product as illuminating oil, knowing it to be explosive and unsafe for domestic use, can plead nothing in defence of this wilful, terrible wrong done to a confiding community. He displays malice in its legal sense in a high degree. *Elkins vs. McKean*, 79 Pa., 493.

Oil Companies.

I. NEGLECT IN DRILLING WELL. No oil well should be allowed to be bored, unless it can be so protected that in all probability no oil or gas shall escape into a neighboring coal mine. *Armstrong vs. Auen*, 38 Pittsburg Journal, 395. *Reed vs. Oil Co.*, 39 *Idem*, 199.

II. NEGLECT IN SELLING VOLATILE OIL. In the absence of all exculpatory evidence, a jury may reasonably infer negligence upon the part of a manufacturer and vendor of illuminating petroleum oil, if the oil ignites at the ordinary temperature of a room in which people live. *McKain vs. Elkin*, 27 Pittsburg Journal, 169.

III. NEGLECT TO PROTECT PIPES. 1. A pipe line company is not liable for the burning of a house, where it appears that burning oil from a neighboring property flowed down the pipe line, causing it to burst and throw a spray of burning oil upon the house. In such a case, the pipe line is not the proximate cause of the injury. *Behling vs. Pipe Lines*, 160 Pa., 359. 2. Where a pipe line company carries oil from a distance, and

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allows it to escape through the pipes and to percolate through another's land and destroy his springs, the company is liable in damages for the injury. *Hauch vs. Pipe Line Co.*, 153 Pa., 366.

Officials.

I. NEGLECT BY RECEIVING BRIBES. An allowance to a public officer by a contractor or employee, however small, is such evidence of fraud as will invalidate the contract. *Lindsey vs. Philadelphia*, 2 Phila., 212.

II. NEGLECT IN DENOUNCING. 1. If a respectable citizen honestly believes and states, that a candidate for a public office is guilty of official misconduct, or is a person of evil repute in the sense that it affects his fitness for the office, such statement is privileged, and may be repeated at a political meeting, though it be absolutely false, and upon inquiry its falsity could have been ascertained, for the voter has the right to discuss the qualifications of candidates seeking his suffrage. A communication to be privileged must be made on a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith the law does not imply malice as in the ordinary case of libel. *Briggs vs. Garrett*, 111 Pa., 404. 2. Where a man exercises the citizen's right to denounce the action of a public officer, it is unlawful for him to make a false and malicious charge of crime or misdemeanor in office. So long, however, as he speaks truth, in words meaning nothing else, he is not liable in damages, whether his language be chaste or vulgar, refined or scurrilous. *Rowand vs. De Camp*, 96 Pa., 493.

III. NEGLECT IN EXACTING FEES. Every remedy, civil and criminal, should be enforced against a public officer exacting illegal fees. *Grand Jury, In re*, 9 Montgomery Co., 121.

IV. NEGLECT IN HOLDING INCOMPATIBLE OFFICES. Where a person holds two incompatible offices, he has the right to elect which of the two he shall retain. *Comm. vs. Haeseler*, 161 Pa., 92.

Officials—Continued.

V. NEGLECT IN PURCHASING AT THEIR OWN SALES. The law will not tolerate that a public officer, charged with selling lands of citizens, should be interested as purchaser in the lands so sold. *Powel vs. Barrington*, 1 Clark, 239.

VI. NEGLECT IN SIGNING BONDS. Where an obligation on its face appears to have been executed for a municipality by its officers, although by them individually, they act as representatives, and are not individually liable. *Heidelberg School District vs. Horst*, 62 Pa., 301.

VII. NEGLECT IN TAKING ILLEGAL FEES. A public officer, who by virtue of his office, demands and takes illegal fees may be compelled to make restitution, and where such fees are paid to such officer without protest, it is not a voluntary payment. *American Steamship Co. vs. Young*, 89 Pa., 186.

VIII. NEGLECT IN THE DEPOSIT OF PUBLIC MONEYS. It is no defence for a state treasurer to allege as an excuse for not paying public moneys to his successor, that he had deposited the funds in the name of the state in a reputable bank which subsequently failed, and the deposit lost without fault or negligence on his part. *Baily vs. Comm.*, 20 W. N., 221.

IX. NEGLECT IN USING PUBLIC MONEYS. The act of March 31, 1860, provides, that if any state, county, township or municipal officer charged with the collection, safe-keeping, transfer or disbursement of public moneys, shall convert to his own use any such moneys or prove a defaulter, every such act shall be deemed an embezzlement. *Comm. vs. Morrissey*, 86 Pa., 416.

X. NEGLECT OF CORONER. Where several persons have been suddenly killed by the same violent cause, and the coroner is summoned, it is proper and necessary for him to hold a separate inquest over each body. He is entitled to fees in each case. *Fayette Co. vs. Batton*, 108 Pa., 591.

XI. NEGLECT OF DUTY. 1. Public officers, acting within the scope of their authority, are not answerable in damages for the consequences of their acts, unless done maliciously and with an intent to injure. *Burton vs. Fulton*, 49 Pa., 151.

Officials—Continued.

2. The neglect or failure of a public official to perform any duty which by law he is required to perform, is an indictable offence, even though no damage was caused by the default, and a mistake as to his powers or with relation to the facts of the case is no protection. *Comm. vs. Coyle*, 160 Pa., 43. *Comm. vs. Medland*, 5 Pa. County, 233. *Comm. vs. Snowden*, 1 Brewster, 218. 3. Under the constitution, a writ of *quo warranto* may issue against a public officer for bribery, fraud or the wilful violation of any election law, without a preliminary conviction for the offence in the United States court. *Comm. vs. Walter*, 83 Pa., 105. 4. The superintendent of common schools has no power to remove a county superintendent, except for neglect of duty, incompetency or immorality. *Field vs. Commonwealth*, 32 Pa., 478. 5. As a general rule, a municipal corporation is not responsible for the unauthorized acts or negligence of its officers and agents. It is not bound by the acts of a public officer who is elected by the city, and over whom it has no control. *Hand vs. Philadelphia*, 8 Pa. County, 213. *Philadelphia vs. Anderson*, *Idem*, 417. 6. Where a bond is given by an officer of an association, conditioned for the faithful performance of his duties, the condition is to be confined to the period of appointment or election for which the bond be given. If the officer be re-elected, a new bond should be given. *Manuf. Loan Co. vs. Odd Fellows*, 48 Pa., 446. 7. The act of April 21, 1846, provides, that the court of common pleas of the county in which any prothonotary, sheriff, county treasurer or other official shall reside, from whom, by law, security is required for the performance of his duties, shall have power to examine into said performance, and the ability and solvency of his sureties, at any time during his tenure of office, and to require additional security, if deemed expedient. *Weber, In re*, 1 Foster, 204.

XII. NEGLIGENCE OF PUBLIC FUNDS. Where a public officer misapplies or misappropriates public funds in his hands, he is liable to the municipality therefor; it is such an act of negli-

Officials—Continued.

gence as amounts in law to a fraud. *Carbondale School District vs. Tuttle*, 2 Pa. Dist., 33. 2 Lackawanna Jurist, 333.

XIII. NEGLECT OF SUBORDINATES. It is true, as a general rule, that a public officer is not liable for the negligence of his official subordinates, unless he commanded the negligent act to be done. *Schoyer vs. Lynch*, 8 W., 453. *Boyd vs. Insurance Patrol*, 113 Pa., 278.

XIV. NEGLECT TO ACT. 1. It is not requisite to the issuing of a mandamus commanding public officers to perform official duties neglected by them, that the complainant should have previously demanded of them that they perform their duty. *Comm. vs. Allegheny Commissioners*, 27 Pa., 237, 277. 2. The performance of an official duty by the councils of a city may be compelled by mandamus. *Lamb vs. Lynd*, 44 Pa., 336.

XV. NEGLECT TO COMPENSATE. 1. All merely compensatory fees for officers are abolished by the statute creating a fee bill. The policy of the law forbids special contracts as to compensation between them and parties to actions. *Hahn vs. Derr*, 1 Woodward's Decisions, 178. 2. A public officer cannot legally claim additional compensation for the discharge of the duties of his office, even though his duties and not his salary are increased. *Hays vs. Oil City*, 35 Pittsburgh Journal, 117. 3. One holding a public office has a *prima facie* right to the salary, although he be physically disabled from performing his duties. *Wilkesbarre vs. Meyers*, 34 Pittsburgh Journal, 375.

XVI. NEGLECT TO PERFORM DUTIES. Mandamus will lie to compel the performance by public officers of duties purely ministerial in their character; but as to all acts and duties necessarily calling for the exercise of judgment and discretion on their part, mandamus will not lie. It will, perhaps, be awarded to set public officers in motion and compel action; yet the courts will not interfere with the exercise of their discretion. *Dechert vs. Comm.*, 113 Pa., 229.

XVII. NEGLECT TO QUALIFY. An elective officer, having

Officials—Continued.

the certificate of election, unless he has duly qualified, is not entitled to the emoluments of the office pending a contest of his election. *Philadelphia vs. Given*, 60 Pa., 136.

XVIII. NEGLIGENCE TO REIMBURSE. A treasurer of a borough, in the settlement of his official account, cannot have a credit for an individual claim against the borough. He cannot repay his own or any other person's debt without an order of the town council. *Todd vs. Patterson Borough*, 55 Pa., 496.

XIX. NEGLIGENCE TO REMOVE. The high power of removal from office for gross neglect of duty or other misconduct is to be exercised strictly. *Directors of Poor, In re*, 9 Luzerne Register, 123.

XX. NEGLIGENCE TO TRY THE RIGHT TO OFFICE. A writ of *quo warranto* to try the right to an office must be brought during the official lifetime of the officer. *Comm. vs. Smith*, 45 Pa., 59.

Official Negligence.

1. An attorney-at-law, who, in purchasing a writ for a client, is charged and pays an exorbitant fee, cannot maintain in his own name an action against the officer. *Baldwin vs. Cash*, 7 W. & S., 425. 2. The principle that the public is not chargeable with the negligence of its officers in matters of account, even as against sureties, is applicable in the case of county commissioners. *Comm. vs. Brice*, 22 Pa., 211. 3. A public officer is guilty of contempt, who refuses to furnish copies of papers wanted on a trial. *Delany vs. City*, 1 Y., 403. 4. It is a general rule, that no one shall suffer by the mistake of the officer of the court. *Hamilton vs. Taylor*, 3 Y., 389. 5. Where a public officer has made an overpayment by mistake, he may recover it, unless he has received a credit for the amount in his account with the commonwealth. *Johnson vs. Rutherford*, 10 Pa., 455. 6. The act of June, 1836, relating to official bonds, gives an action to persons affected by the acts or neglect of public officers, enabling a party to sue out a writ in the name of the commonwealth,

Official Negligence—Continued.

suggesting his name as plaintiff. Two persons may join or sue separately, and set forth breaches to their particular injury; another person, to whom a cause of action accrues before judgment, may file a suggestion and become a party. If final judgment be rendered, it is first for the commonwealth, and second, for the plaintiff to the amount of damages assessed, and costs. *Karch vs. Comm.*, 3 Pa., 274. 7. Courts of late years have been indulgent in admitting amendments to cure the slips of officers; and more especially is it permitted among us, where legal proceedings are so slowly and often negligently conducted. *Rainey vs. Comm.*, 10 W., 348. *Miller's Appeal*, 14 Lancaster Bar, 70. 8. Offices are created for the benefit of the community, not for the emolument of individuals. Every public officer ought to know his duty, and exercise it with fidelity, or he will become responsible to the party aggrieved. *Work vs. Hoofnagle*, 1 Y., 506.

Ordinance.

NEGLECT IN DATE. The mistake of a date, in the formal approval by the mayor of an ordinance of councils, where such mistake was accidental, and prejudiced no one's rights, will not affect the validity of the ordinance. *Allentown vs. Grim*, 109 Pa., 113.

Orphans' Court.

I. NEGLECT BY MISREPRESENTATIONS AT SALE. 1. Misrepresentations at an orphans' court sale, made by the administrator, as to the title of the land sold, constitute ground for setting aside the sale, on the application of the purchaser, before final confirmation of the sale. *De Haven's Appeal*, 106 Pa., 612. 2. The maxim of *caveat emptor* applies to all judicial sales as a rule; but sales made under the direction of the orphans' court, must be conducted in good faith, all misdescription and misrepresentation being avoided. A purchaser at these sales is not bound to take a doubtful title, and

Orphans' Court—Continued.

every title is doubtful which exposes the party to litigation. *Howe's Estate*, 35 W. N., 16.

II. NEGLIGENCE IN ADJUDICATION. 1. The finding of facts by an auditing judge in the adjudication of an account are conclusive, unless clearly erroneous and unsupported by evidence. *Drinkhouse Estate*, 29 W. N., 35. 2. The orphans' court has power to review and correct its adjudications, if it discovers therein a palpable mistake, produced either by its own inadvertence or by the blunder of the parties. *George's Appeal*, 12 Pa., 260. *Milne's Appeal*, 99 Pa., 483. *Johnson's Appeal*, 114 Pa., 141. *Brubaker's Estate*, 4 Lancaster Review. 3. Exceptions to an adjudication ought not to be filed, unless the matters to which they relate were brought to the attention of the auditing judge. *Jetter's Estate*, 14 Phila., 19.

III. NEGLIGENCE IN APPEAL. Where an auditing judge files an adjudication and enters a formal decree, the better practice is that a party dissatisfied with a finding of facts or law, by the auditing judge, should file exceptions thereto, and have them considered by the orphans' court in banc, before he appeals to the supreme court. *Patterson's Appeal*, 104 Pa., 369.

IV. NEGLIGENCE IN EXCEPTIONS. Exceptions in the orphans' court are, in effect, assignments of error, and should indicate with equal exactness the precise grounds on which they are based. *Teaf's Estate*, 20 Phila., 3.

V. NEGLIGENCE IN PROCEEDINGS. It is well-established, that irregularities in the proceedings of the orphans' court, cannot, after their confirmation, be urged against their validity in a collateral proceeding. *West vs. Cochran*, 104 Pa., 482.

VI. NEGLIGENCE IN SALE OF REAL ESTATE. 1. The orphans' court has power to set aside a sale of real estate, made in pursuance of its own order, for inadequacy of price. This is a matter that rests in the sound discretion of the orphans' court, and the supreme court will not review it, unless the record shows palpable and gross abuse. *Bower's Appeal*,

Orphans' Court—Continued.

6 Luzerne Register, 165. 2. The orphans' court may set aside a sale of real estate for mere inadequacy of price, if it be a material one, and if the application to set aside be promptly made. *Breese's Estate*, 11 Luzerne Register, 70. 13 Lancaster Bar, 196. 3. In the absence of proof of irregularities, inadequacy of price is not a sufficient ground for setting aside an orphans' court sale. *Crowrath's Estate*, 1 Woodward's Decisions, 103. *Rengler's Estate*, *Idem*, 215. *Dimock's Estate*, 3 Clark, 261. 4. It was not error for the orphans' court to set aside a sale made under a testamentary power, although for a full price, where it appeared that there had not been a due execution of the power of sale by both executors. *Daily's Appeal*, 87 Pa., 487. 5. In an orphans' court sale of real estate the maxim of *caveat emptor* applies only in the absence of any interference or inducements held out by the agent or trustee of the court or his counsel, to persuade the parties bidding to purchase. In such case the court should not force a disputed title upon an unwilling purchaser. *De Haven's Appeal*, 2 Delaware Co., 209. *Howe's Estate*, 14 Pa. County, 574. *Foster's Estate*, 5 Lancaster Bar, No. 46. 6. As a general rule, the court will not set aside a judicial sale for inadequacy of price merely; but when the price is grossly inadequate, the interest of heirs and creditors must be primarily regarded, and the sale will be set aside, and a re-sale ordered. *Hepting's Estate*, 1 Lancaster Review, 45. 7. An orphans' court sale of land will be set aside for inadequacy of price, on exceptions accompanied by a bond to bid a much higher price. *Herr's Estate*, 6 York Record, 167. *Herr's Estate*, 2 Pa. Dist., 737. 8. Under the act of March 29, 1832, the orphans' court has no jurisdiction to authorize a private sale of real estate for the payment of debts. A public sale is as a general rule, a fairer way to sell the property. *Miller vs. Spear*, 21 W. N., 554. Pa. Co., 248. 9. Where the hand-bills and catalogues erred as to amount, due upon an encumbrance, a purchaser at orphans' court sale, subject to such encumbrance, who was thus misled, will be

Orphans' Court—Continued.

relieved. *Moulton's Estate*, 15 Phila., 579. *Jayne's Estate*, 2 W. N., 536. *Murtland's Estate*, 13 W. N., 179. 10. Where a re-sale of real estate is applied for on account of inadequacy of price, an advance of at least ten per cent. should be proffered and secured before a sale will be set aside. *Murphy's Estate*, 11 W. N., 419. 11. Representations as to title, inducing a bidder who has no other means of information, and who is not chargeable with negligence into mistake of a material fact, entitle him to relief. *Porter's Estate*, 3 Luzerne Register, 47. 12. The omission of an administrator to file his bond as required by law on selling real estate of a decedent for the payment of debts, will not invalidate the purchaser's title, the irregularity being cured by the confirmation of the sale by the orphans' court. *Potts vs. Wright*, 82 Pa., 498. 13. It is sufficient ground for setting aside an orphans' court sale, that there was a material mistake in the number of acres of the property sold, and also that there was fictitious bidding at the sale. Judicial sales should be conducted so as not to mislead or entrap bidders. Those who conduct them should act in good faith and avoid misrepresentations. *Schug's Appeal*, 14 W. N., 49. 14. It is the duty of an administrator, when real estate of a decedent which is subject to a mortgage is sold by an auctioneer, to see that the existence of such encumbrance is announced, otherwise upon petition of the purchaser, the sale will be set aside at the cost of the administrator. *Schwartz's Estate*, 12 Phila., 71. 15. An orphans' court sale for payment of debts may be set aside on the application of the purchaser after an acknowledgment and delivery of the deed, where he has been grossly deceived in the decedent's title, and where nothing has occurred since the sale to affect the rights of third parties. *Tubbs' Estate*, 7 Kulp, 483. 16. The doctrine of *caveat emptor* does not apply to orphans' court sales for the payment of debts. *Walker's Estate*, 1 Delaware Co., 384. 17. The orphans' court has the power to set aside a sale made by its order, not only after the sale has been confirmed, but even after the

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payment of the purchase money and the delivery of the deed to the purchaser. *Wiltberger's Estate*, 18 Phila., 232. 18. Where there has been a misdescription and misrepresentation of real estate sold under an order of the orphans' court, the court will open a decree of confirmation and set the sale aside. *Wiltberger's Estate*, 4 Pa. County, 184. 19. An orphans' court sale will not be set aside if fairly made on the terms prescribed by the court, if no one offers more at the re-sale. *Wright's Estate*, 14 Luzerne Register, 387. 20. The power of the orphans' court to set aside a sale of real estate made in pursuance of its own order is a matter which rests within its sound discretion, and its exercise will not be reviewed, unless the record shows gross abuse. *Bowers' Appeal*, 84 Pa., 311.

VII. NEGLECT OF BIDDER AT SALE. 1. The employment of a bidder, merely to raise the price at a sale of real estate made under an order of the orphans' court, is a fraud upon the purchaser. *Pennock's Appeal*, 14 Pa., 446. 2. A purchaser at an orphans' court sale will not take a good title to the property, where he has agreed to pay the judgment of another person, if the latter will not bid. *Phelps vs. Benson*, 161 Pa., 418. 3. Fictitious bidding at a sale vitiates it, no matter in what manner or by what form effected. Misdescriptions and misrepresentations will also result in overthrowing it. *Schug's Appeal*, 32 Pittsburgh Journal, 19. 4. In an action against the purchaser at an orphans' court sale of decedent's real estate for the difference between the amount of his bid and what the property brought at a re-sale, the defendant cannot inquire into the regularity of the court proceedings, nor set off a debt due to him by the decedent. *Singerly vs. Sirain*, 33 Pa., 102. 5. When the highest bidder refuses to comply with his bid, the sale may be returned as made to the next bidder. *Stiver's Appeal*, 56 Pa., 9.

VIII. NEGLECT TO DIRECT AN ISSUE. Under the act of March 15, 1832, whenever a dispute upon a matter of fact arises before the orphans' court, which before the constitution of 1874 would have been before the register's court, it

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becomes the duty of that court to direct a precept for an issue to the court of common pleas of the county to try such disputed fact. This need only be done, where the judge deems the dispute a substantial one, and not where the evidence submitted to him was such that if a verdict were given against the proponents of the will, the judge would feel constrained to set it aside. *Knauss' Appeal*, 114 Pa., 10.

IX. NEGLECT TO GRANT BILL OF REVIEW. 1. The petition for a review must fully and clearly specify the error complained of, and when founded on an error in account must allege that distribution has not been made by the accountant; for a bill of review is not grantable after the fund is actually paid to distributees. *Bear's Estate*, 11 Lancaster Review, 71. 2. A petition for review in the orphans' court, which fails to aver that no distribution has been made, is fatally defective. *Beck's Estate*, 4 Pa. County, 385. 3. A bill of review in the orphans' court, under the act of October 13, 1849, is a matter of right; and where a proper case is set forth on the face of the petition verified by affidavit, it is the duty of the court to grant a rehearing, unless the proviso appended to said act applies. It will not be granted, unless there is an averment that the fund is still in the hands of the accountant. The application must be made without delay, for laches will defeat it. *Bibby's Estate*, 18 Phila., 94. *Neal's Estate*, *Idem*, 96. *Clothier's Estate*, *Idem*, 230. *Beck's Estate*, *Idem*, 237. 4. A petition for a review, unless presented promptly, must show error on the record, or matter arising since the decree. *Cremer's Estate*, 13 Phila., 253. 5. To justify a bill of review of an executor's account, there must either be error on the face of the account or new facts arising since the decree, or newly-discovered evidence, and it is imperatively required that the errors shall be specifically set forth in the petition. It will not be allowed where no error of law is claimed or no new matter alleged. *Frey's Estate*, 12 Phila., 15. *Smith's Estate*, *Idem*, 87. 6. A petition of review may not be granted, save upon such grounds as would prevail in the court of chan-

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cery. Errors in fact in the decree are not sufficient to support a petition of review. A review will not be granted because of the absence of witnesses, unless they and their testimony were discovered after the decree. *Green's Appeal*, 3 Brewster, 66. 7. Where a bill of review alleges no patent error in the account, no facts occurring subsequently to its confirmation, no after-discovered evidence, no fraud on the part of the accountant, and no irregularity in procuring the confirmation, a review will not be granted, even though the accountants have charged alleged exorbitant commissions. *Heckman's Estate*, 2 Woodward's Decisions, 165. 8. A petitioner is not entitled to a review of an account confirmed by the orphans' court, as a matter of right, unless error of law appear on the face of the record, or new matter arise after the decree; but a review may be granted as a matter of grace for new proof discovered after the decree, unless distribution under the decree has been made. The after-discovered proof must be of such a nature, that it could not possibly have been used at the time the decree was made. *Kennedy's Estate*, 35 W. N., 544. 9. Under the act of October 13, 1840, limiting the time when a bill of review may be allowed, a bill of review is demandable as of right for errors of law patent on the record, or for new matter which has arisen since the decree; and as of favor, for proof which has been newly discovered and could not have been used when the decree was made. It is also demandable upon proof of fraud, unless the petitioner has been guilty of laches since its discovery. *Lee's Estate*, 29 W. N., 346. 20 Phila., 133. *McNeil's Estate*, 18 Pittsburg Journal, 154. *Rittenhouse's Estate*, 1 Parsons, 313. 10. As a matter of right a review can be had only for error apparent on the face of the record, or for new matter that has arisen since the decree. It may be had *ex gratia* for new evidence as to facts discovered after decree made, which could not have been procured by the exercise of due diligence before. *Le Moyne's Appeal*, 3 Pennypacker, 510. 11. A review will not be awarded to correct alleged errors of

Orphans' Court—Continued.

fact that could have been established at the hearing by the exercise of due diligence. *Smith's Estate*, 4 Kulp, 177. 12. An application for rehearing or review in the orphans' court will not be granted if there is any laches or negligence on the part of him who seeks it. *Wainwright's Estate*, 16 Phila., 266. 13. A petition for a review, grounded solely upon supposed errors of the auditing judge in drawing his conclusions from the evidence, cannot be entertained. *Wartman's Estate*, 15 Phila. 518. 14. A petition of review alleging facts showing fraud in the procurement of the decree, must be granted. *Weidner's Estate*, 1 Woodward's Decisions, 188. 15. The orphans' court, without a bill of review, has no authority to change a final decree after the end of the term at which it was rendered; and such bill is too late after an actual payment in accordance with a decree of the court. *White's Estate*, 31 W. N., 159.

X. NEGLECT TO GRANT ISSUE. 1. The demand of an issue in the orphans' court is not a matter of right, upon every disputed claim. It must be shown by evidence, that there exists in regard to such claim some disputed fact, to determine which a jury is necessary. *Beehler's Estate*, 3 Phila., 254. 2. An issue will not be granted, unless there is sufficient evidence on both sides to render the matter so doubtful that the verdict, for whichever party, could not be set aside as unwarranted. To determine whether an issue should be awarded, the orphans' court must be informed what the evidence is on both sides. If the demand be unsustained by competent proof, or the question proposed to be submitted to a jury be irrelevant or immaterial, it is the duty of the court to refuse the issue. *Clendandaniel's Estate*, 13 Phila., 248. *Boyer's Estate*, *Idem*, 254.

Overseers of the Poor.

NEGLECT OF CO-OVERSEER. Overseers are not jointly liable for money collected by each other in their official capacity; but if they be charged jointly by the auditors with a balance, and if they acquiesce in that settlement they both become liable. *Huling vs. Overseers*, 3 W. & S., 367.

P

Paper Books

I. NEGLECT IN CITATION OF CASES. 1. Pennsylvania cases referred to in a paper book should not be cited by the name of the reporter, where the number of the report can be given. *Farquhar vs. Levy*. 142 Pa., 234. 2. Counsel citing decisions of the supreme court from periodicals shall certify at the end of their brief, that such cases are not reported in the state reports; otherwise these cases cited will not be considered. *Rule XIX, In re*, 20 W. N., 553.

II. NEGLECT IN COPYING DOCKET ENTRIES. Under the rules of the supreme court, requiring that docket entries should be printed, the appellant's paper book must contain a literal copy; to present them in a garbled form is an offence, which, if committed intentionally and to deceive, will be punished by disbarment. *Bristor vs. Tasker*, 135 Pa., 110.

III. NEGLECT IN THE LANGUAGE. Where a paper book contains scandalous language, the supreme court may, of its own motion, suppress it. Objectionable words, hastily spoken in the warmth of oral argument, may often be excused. In printed arguments, there is no excuse for such language. The court will usually allow such language to be expunged. *Matthews' Appeal*, 104 Pa., 451. 13 W. N., 503. *Palethorp vs. Whittaker*, 1 W. N., 163.

IV. NEGLECT IN PREPARING. 1. Nothing should ever appear as testimony in paper books that has not been certified to by the presiding judge below. An observance of this rule would save much trouble and many disputes. *Bennett vs. Fulmer*, 49 Pa., 161. 2. Good faith to the court should prevent any assignment of error, without a conscientious belief that it is an error. The principle decided in an authority cited, the names of the parties to the cases cited, and the page of the

Paper Books—Continued.

book where the case begins, should be stated. Dates should be scrupulously given, and proofs of paper books corrected. The observance of the rules of the supreme court will be insisted on. *Burkholder vs. Stahl*, 58 Pa., 372. 3. The evidence in a case should be contained in the bill of exceptions and be certified from the judge's notes. The practice is entirely irregular for a party to print in his paper book so much of it as he thinks proper, occasioning trouble to the court to ascertain what is the testimony. *Tanner vs. Oil Creek R. R.*, 53 Pa., 413.

V. NEGLECT OF APPELLEE. An appellee should always furnish a paper book to the judges of the supreme court. The pressure of business upon that court demands all the aid it can receive from counsel, who owe a duty to their clients and to the court to furnish an argument and all authorities within reach. *Ebbert's Appeal*, 70 Pa., 82. *Schenley's Appeal*, *Idem*, 101.

VI. NEGLECT TO CONFINE FACTS TO THE TESTIMONY. No history of the parties or the case is at all allowable, unless disclosed by the testimony. *Walters vs. Bredin*, 70 Pa., 238.

VII. NEGLECT TO DIGEST THE EVIDENCE. In equity appeals, the labors of the supreme court would be lightened if counsel in the preparation of their arguments would collect the evidence bearing upon the point under discussion, giving references to the pages where it can be found in full. *Morgan's Appeal*, 19 W. N., 19.

VIII. NEGLECT TO FURNISH THE RECORD. Under the rules of the supreme court of Pennsylvania, as set forth in 18, Penna. Reports, 577, the record and the sealed bill upon it should be set forth in the paper book of the plaintiff in error. *O'Donnell vs. Allegheny R. R.*, 50 Pa., 494.

IX. NEGLECT TO INCLUDE ARGUMENTS. Where the paper book of an appellant from the decree of the court below confirming the report of a master, contains no argument in support of the specifications of error, the appeal may properly be dismissed therefor. *Stockdale vs. Maginn*, 131 Pa., 507.

Paper Books—Continued.

X. NEGLECT TO INCLUDE PAPERS AND NOTES OF TESTIMONY. 1. It is an established rule of the supreme court, not to reverse on account of the reception or rejection of written evidence, without having the paper or a copy of it. The *onus* is on a plaintiff in error to make out his assignment of error affirmatively, and he must furnish in the record and in his paper book all that is necessary for that purpose. *Aiken vs. Stewart*, 63 Pa., 30. 2. Errors committed in the trial of a cause, must be shown by a bill of exceptions settled before the judge and sealed by him. Certainly nothing less than his notes of testimony, duly certified, will be taken in the appellate court as evidence of the state of the facts'. The paper books should contain these. *King vs. Faber*, 51 Pa., 387.

XI. NEGLECT TO INDEX. By a rule of the supreme court, all paper books in such court exceeding twenty pages must be indexed, or they may be suppressed. *Hessel vs. Bradstreet Co.*, 141 Pa., 501.

XII. NEGLECT TO INSERT ENTIRE BILL OF EXCEPTIONS. A suppression of a material part of the bill of exceptions from the paper book handed the supreme court would deserve the severest censure. *Vanarsdale vs. Laverty*, 69 Pa., 108.

XIII. NEGLECT TO PRINT THE PLEADINGS. 1. Where the appellant has failed to print his declaration in his paper book, as required by the rule of court, and all the assignments of error refer to the declaration, the supreme court may affirm the judgment, without further examination of the case. *Murdock vs. Martin*, 147 Pa., 203. 2. A plaintiff in error takes the risk of the consequences which may follow from leaving out of his paper book something that the rules of the supreme court require him to print; but when the matters omitted are not necessary to a proper review of the judgment he will not be prejudiced. *McBeth vs. Newlin*, 32 *Pittsburg Journal*, 82. 3. On appeal from an order refusing to take off a nonsuit, it is vitally important that the appellant's paper book should contain the pleadings in full. *Finch vs. Conrade*, 154 Pa., 326.

XIV. NEGLECT TO PRINT THE TESTIMONY. 1. Where

Paper Books—Continued.

the appellant fails to print in his paper book the greater part of the testimony, the supreme court will assume that the portions of the charge assigned as error are fully warranted by the testimony. *Bradley vs. Vernon*, 166 Pa., 603. 2. The supreme court will not hear argument upon or consider specifications of error based upon testimony which the appellant, in violation of the rules of court, has neglected to present accurately and fully in his paper books. *Brooks vs. Church*, 135 Pa., 138. 3. Where the rule of court requiring the evidence to be printed in plaintiff in error's paper book is not complied with, the judgment will be affirmed. *Cockill vs. Willing*, 4 Pittsburg Journal, 588. 4. Where the plaintiff in error omits to print material testimony, and the defendant in error does not print it, the version of the evidence contained in the charge of the court below will be assumed by the supreme court to be correct. *Joyce vs. Lynch*, 17 W. N., 79. 5. But a party need not print evidence wholly unnecessary to an understanding of the question. The rule requires the printing of an appendix containing such documentary or other evidence as may be necessary. *McBeth vs. Newlin*, 15 W. N., 129. 6. Where the error assigned was that the court below directed a verdict, the case will not be reversed unless all the evidence is printed, certified by the judge. *Schlippey vs. Foust*, 3 Walker, 56. *Davenport vs. Wright*, 51 Pa., 292. 7. Where the error assigned is to the finding of a fact by an auditor or master, the printed argument shall contain a synopsis of all the evidence bearing upon such disputed question of fact, with a reference to the pages of the paper book where such evidence may be found *in extenso*. *Silliman vs. Kuhn*, 142 Pa., 461. 8. It is the duty of the plaintiff in error to print the evidence in his paper book. Where he failed to print any of it, and the defendant in error printed a portion of it, the court refused to consider the latter. *Smith vs. Bank*, 104 Pa., 518. 15 W. N., 326. 9. An appeal from the orphans' court brings up all the evidence, and if the appellant fail to print all the evidence bearing on the questions to be

Paper Books—Continued.

decided by the appellate court, he is liable to have his paper book quashed and his appeal dismissed. *Solt's Appeal*, 4 W. N., 298. 10. It is the duty of the appellant to furnish in his paper book all the evidence in the case. In the present instance, he printed only a portion of the testimony, the balance being printed by the appellee. The court directed the appellant to pay the appellee the cost of such printing, the amount to be taxed by the orphans' court. *Wharmby's Appeal*, 4 Kulp, 23.

XV. NEGLECT TO SPECIFY POINTS. Under the rules of the supreme court, assignments of error to the answer of the court below to points, will be dismissed, if the points do not appear upon the paper book. *Arthurs vs. Smathers*, 38 Pa., 40.

Parent and Child.

I. NEGLECT, BY WHICH CHILD INJURED. If an injury be inflicted on a child, while living with and in the service of his father, he may maintain trespass; but if at the time he be hired to and in the service of another, trespass on the case is the proper remedy. *Wilt vs. Vickers*, 8 W., 227.

II. NEGLECT IN AWARDING DAMAGES. Where a parent brings suit to recover damages for the death of a minor child, occasioned by the negligence of defendant, he is only entitled to recover the value of the child's services during minority, in addition to the expenses caused by the injury and death. *Lehigh Iron Co. vs. Rupp*, 30 *Pittsburg Journal*, 41.

III. NEGLECT IN PAROL GIFT OF LAND. As between a parent and child, the evidence to establish a parol gift or sale of land must be direct, positive, express and unambiguous; its terms must be clearly defined, and all the acts must specially refer to it. *Erie & Wyoming Valley Co. vs. Knowles*, 117 Pa., 77.

IV. NEGLECT IN PUNISHING CHILD. A parent may be guilty of an assault and battery by inflicting unreasonable punishment on a child. *Comm. vs. Blaker*, 1 Brewster, 311.

Parent and Child—Continued.

V. NEGLECT OF BASTARD CHILD. The subsequent marriage to the prosecutrix in a bastardy suit will not release the payment ordered by the court to be paid for the maintenance of the child. *Phillippi vs. Comm.*, 18 Pa., 116.

VI. NEGLECT OF CONTRACT FOR SERVICES. The law is well settled, that between parent and child, there can be no recovery for services or maintenance, unless upon proof of an express contract to pay therefor. The evidence must be direct and positive. *Burgess vs. Burgess*, 109 Pa., 316.

VII. NEGLECT OF CHILD TO OBEY. The father being charged with the obligation of maintenance and education, cannot perform these duties without the authority to command and enforce obedience. The term education comprehends a proper attention to the moral and religious sentiments of a child, and it is the undoubted right of a father to designate teachers in morals and religion, as he may deem best fitted to instruct his child. But he has no right to control the rights of conscience of a child who has arrived at years of discretion in relation to the worship of God. *Comm. vs. Armstrong*, 1 Clarke, 146. *Comm. vs. Sigman*, 2 Clark, 36.

VIII. NEGLECT ON THE PART OF A CHILD. A father is liable to be sued for the injuries occasioned by the neglect or unskillful acts of his minor child whilst in the course of his employment. *Sample vs. Styer*, 3 Lancaster Review, 163.

IX. NEGLECT TO CLAIM SERVICES OF CHILD. A parent may relinquish his right to the services of his minor child, so that he cannot reassert such right. The old common law view of the absolute right of the father to the services of his child was never part of the law of Pennsylvania. *Comm. vs. Gilkeson*, 5 Clark, 30.

X. NEGLECT TO CLAIM WAGES OF CHILD. A father's right to the wages of his minor child may be renounced or forfeited. He may renounce his right, by allowing his child to have the exclusive use of the fruits of his own industry, or he may forfeit his right, by neglecting to perform those duties which are

Parent and Child—Continued.

the foundation of that right. *McGinnis vs. The Grand Turk*, 2 Pittsburg, 326.

XI. NEGLECT TO EDUCATE CHILD. It is the highest duty of a parent to give proper instruction to his children, and to take care of their morals. It is in some degree optional with a parent, whether he will raise up children to be ornaments or a disgrace to himself and family. *Hollis vs. Wells*, 3 Clark, 171.

XII. NEGLECT TO PROTECT CHILD. 1. If any negligence on the part of parents has contributed to the death of a child, they cannot recover damages. The measure of damages for the death of a minor child, occasioned by negligence, is the money value of the child's services until it attains its majority, reduced by the cost of its maintenance and education. *Birmingham vs. Dorer*, 3 Brewster, 69. 2. Neglect of a minor child means a failure to provide things necessary for the preservation of its life and health, without justifiable excuse. It is not contributory negligence *per se*, on the part of a parent to permit a young child to go unattended on the streets. *Comm. vs. Stewart*, 2 Pa. Dist., 43. *Rourke vs. Traction Co., Idem*, 319. 3. If a mother permits a child of tender years to pass, cross and stand on a railroad crossing, the father of the child cannot recover damages for injuries to the child. Such action is contributory negligence on the parent's part. *Cato vs. R. R.*, 30 **Pittsburg Journal**, 18. 4. Parents who allow a young child to go alone and unprotected upon the public streets near a place of known danger, are guilty of negligence, and where such negligence contributed to his injuries, they cannot recover for loss of service. *Hampton vs. Bridgeport*, 4 Montgomery Co., 201. 5. Where a parent permits a child of tender years to engage in a dangerous occupation, such parent is guilty of negligence *per se*, as he owes to the child the duty of protection. The parent in such case is *in pari delicto* with a negligent defendant, and though the infant may recover against a wrong-doer for an injury caused partly by his own imprudence, the parent cannot. *McCool vs. Coal Co.*, 150 Pa., 638.

Parent and Child—Continued.

6. A father owes his child protection. It is his duty to shield him from danger, and his duty is the greater the more helpless or indiscreet the child may be. If, by his own neglect, or carelessness, he contributes to his own loss of the child's services, he may be *in pari delicto* with a negligent defendant. *McCool vs. Coal Co.*, 5 C. P. Reporter, 269. 7. Where a parent brings an action for the death of a child of tender years, the conduct of the parent and the attendant circumstances are to determine the question of contributory negligence on the part of the parent. *Penna. R. R. vs. James*, 22 **Pittsburg Journal**, 54. 8. Parents should see that their children of tender years, when on the streets, are properly guarded. Whether such care has been bestowed is a question for the jury. *Reinike vs. Traction Co.*, 31 W. N., 472. 9. Where a father has acquiesced in his child accepting dangerous employment, he is guilty of contributory negligence if he knew of the danger. *Schwenk vs. Kehler*, 36 **Pittsburg Journal**, 371. 10. In an action against a mine owner by a father to recover damages for the death of his child, a boy of fourteen, the jury must decide whether the father was guilty of contributory negligence in allowing his son to work in a dangerous position in the mine, without using precautions to protect him from danger. *Weaver vs. Iselin*, 161 Pa., 386. 11. A parent owes a reasonable duty of protection to his children, and cannot cast the whole of that duty upon strangers. If he permits them, when of tender years, to wander off in places of known danger, and by reason thereof an accident occurs to them, he has no just claim to make others bear the consequences of his own neglect. *Westerberg vs. Kuizna*, 142 Pa., 271. *Breckenridge vs. Bennett*, 7 Kulp, 95. *Hampton vs. Bridgeport*, 6 Lancaster Review, 25.

XIII. NEGLIGENCE TO SUPPORT CHILD. 1. A step-father is under no legal obligation to support a step-child after the death of its mother. If the child resides in his family and he maintains and educates it, he is not entitled to compensation without proof of an express contract therefor. *Brown's Appeal*,

Parent and Child—Continued.

112 Pa., 18. 2. Under the act of June 11, 1879, wilful neglect of children is a want of ordinary care that is without justifiable excuse, and such as arises from an evil intent to injure such children, or culpable indifference to their welfare. At common law, a father's liability to support a child ceases when the child reaches the age of twenty-one, unless the child is of such feeble and dependent condition physically or mentally as to be incapable of self-support. *Comm. vs. Stewart*, 12 Pa. County, 151. 4 Pittsburgh Journal, 59. *Mount Pleasant Overseers vs. Wilcox*, 1 Pa. County, 447. 3. Under the desertion act of April 13, 1867, the jurisdiction of the offence is not confined to the court of the county of the defendant's residence, The warrant is returnable to the court of the county in which it issued, and the defendant is bound to appear there. The information may be made by the wife or child before any magistrate of the commonwealth. *Demott vs. Comm.*, 64 Pa., 302. 4. The common law rule that the father is entitled to the custody of his minor child, is modified by the act of May 4, 1855, which provides that when the father shall neglect or refuse to provide for his child, the mother shall have his rights, provided she shall afford the child a good example. *Eustice vs. Coal Co.*, 120 Pa., 299. 5. A father, who is of ability to support and educate his child, is not entitled to charge for its maintenance. But chancery will allow even for past support, where the father was not of competent ability, and the minor child possess a suitable estate. *Harland, In re*, 5 R., 323. 6. In order to compel a father to relieve and maintain a son who is a pauper, it must be shown that the father is of sufficient ability. *Huntingdon Overseers vs. Krickbaum*, 8 Luzerne Register, 127.

Parties.

I. NEGLECT, RESULTING IN DEATH. By the act of April 15, 1851, no action, to recover damages for injuries to the person by negligence or default, shall abate by plaintiff's death, but his personal representatives may be substituted, and

Parties—Continued.

prosecute the suit to final judgment. When death ensues, and no suit be brought by the party injured during his life, the widow of such deceased, or if there be no widow, his personal representatives may maintain an action for damages. *Penna. R. R. vs. Henderson*, 51 Pa., 329.

II. NEGLIGENCE IN NAMES. Where a suit was erroneously brought in the name of a plaintiff, when it should have been brought in the name of another to the use of the plaintiff, and should have been so amended in the court below, but was not, the supreme court will so amend it, if the case should be before it. *Barnhill vs. Haigh*, 53 Pa., 165.

III. NEGLIGENCE TO JOIN. If a contract was joint, the non-joinder of the contracting parties should be pleaded in abatement. *Means vs. Milliken*, 33 Pa., 520.

Partition.

I. NEGLIGENCE IN JOINING PARTIES. The joinder of the widow, who has not an immediate estate, is an incurable error in an action of partition. Her name cannot be disposed of on the record of *nolle prosequi*. In a personal action for a wrong that may have been done jointly, the joinder of defendants not guilty is immaterial, because a tort is the separate act of each one concerned in it. Real actions, like partition, stand on a different footing, and a *nol pros* is forbidden for a cause which goes to the writ. *Power vs. Power*, 7 W., 212.

II. NEGLIGENCE IN THE NAMES OF PARTIES. The omission of the Christian name of a party in partition, does not prevent the court from obtaining jurisdiction over him by publication. *Girard Life Ins. Co. vs. Farmers & Mech. Bank*, 57 Pa., 388.

III. NEGLIGENCE IN SALE OF PROPERTY. Although a judicial sale will not usually be set aside for inadequacy of price, yet where the price is grossly inadequate, the interest of the heirs must be primarily regarded. *Allen's Estate*, 1 W. N., 317.

IV. NEGLIGENCE OF NAMES OF PARTIES. It is error to enter a judgment *quod partitio fiat*, without all the co-tenants having been named of record; unless all the parties in interest are

Partition—Continued.

named, no title can pass under the proceedings. This error is not cured by the mere addition of the name of a co-tenant omitted as one of the defendants after judgment. *Young vs. Young*, 88 Pa., 422.

V. NEGLECT OF NOTICE TO HEIRS. 1. Notice to the widow and heirs is not necessary, but a rule to show cause is certainly advisable before awarding an inquest in partition in the orphans' court. It is not necessary that the rule to accept or refuse should be served by the sheriff, though he may be required to do so. *Horam's Estate*, 59 Pa., 152. *Vensel's Appeal*, 77 Pa., 75. 2. All of the heirs not being present at the time of making the report of partition by the commissioners, instead of offering the purparts to those present, a rule should have been granted by the court upon all the heirs to come in on a certain day to refuse or accept the purparts at the appraisement. *Bartholomew's Appeal*, 71 Pa., 292.

VI. NEGLECT OF NOTICE OF PETITION. Although the better practice, it is not necessary to give notice of the petition for partition, if the return to the writ shows that all parties interested had notice of the inquest. *Vensel vs. Colmer*, 1 W. N., 56. *Hanbest's Estate*, *Idem*, 171.

VII. NEGLECT OF NOTICE OF PROCEEDINGS. The act of April 14, 1835, requires that in proceedings for the partition and valuation of an intestate's real estate, the parties in interest shall be named in the petition, decrees and notices when known, and provides for publication to reach those whose names and residences are unknown. *Thompson vs. Stitt*, 56 Pa., 159.

VIII. NEGLECT OF PROTHONOTARY TO ENTER JUDGMENT. The entry of a judgment, "*quod partitio fiat*," upon the court minutes suffices, even though the prothonotary has neglected to transfer it to the appearance and lien dockets at the time it was entered. *Girard Life Ins. Co. vs. Farmers' and Mech. Bank*, 57 Pa., 388.

IX. NEGLECT TO ACCEPT OR REFUSE. On the return of an inquisition of partition in the orphans' court, and its confir-

Partition—Continued.

mation, a rule should issue upon the heirs, to attend before the court and accept or refuse the property. Publication of such notice is required. *Sankey's Appeal*, 55 Pa., 491.

X. NEGLECT TO COMPLY WITH ORDER OF SALE. Where an executor or administrator has neglected or refused to execute an order of sale in partition, the court, under the act of February 24, 1834, may appoint a trustee to make such sale. *Neeld's Appeal*, 70 Pa., 117.

XI. NEGLECT TO ELECT TO TAKE LAND. Election to take land by seniority or sex belongs solely to proceedings in the orphans' court. In the common pleas, preference is given to seniority of title only, and when that fails it belongs to the discretion of the court to award it. Under the act of April 22, 1856, preference is taken away when a bid higher than the valuation is offered. This act warrants only a single offer in writing, and the court can compel the parties to hand their offers in together, or permit them to seal them up until the court can order them all to be opened. *Klohs vs. Reifsnyder*, 61 Pa., 240.

XII. NEGLECT TO MAKE. Tenants in common, who hold an estate for life or years, may compel those having estates of freehold to make partition, but such partition shall not prejudice the interest of any one not made a party thereto. *Duke vs. Hague*, 107 Pa., 57.

XIII. NEGLECT TO NAME ALL PARTIES IN INTEREST. In proceedings in partition in the orphans' court, in order to divest the interest of any person, it is necessary that such person should be named in the petition, decree and notices. Where the name of a party in interest does not so appear, unless it appear by affidavit that his name was unknown and publication made accordingly, his share or estate will remain undivided or uninvested, unless by some subsequent act of such party it has been ratified. *Richards vs. Rote*, 68 Pa., 248.

XIV. NEGLECT TO OPPOSE. Family arrangements, if fair and equitable, should not be disturbed after long acquiescence, which is strong evidence of ratification by a ward of the act of

Partition—Continued.

his guardian. A partition by an infant, although unequal, is only voidable by him when he comes of age. If he takes the whole profits after age, the partition is good forever. *Johnston vs. Furnier*, 69 Pa., 449.

Partnership.

I. NEGLECT IN CONFESSING JUDGMENT. 1. One partner may confess a judgment against the firm for a firm debt not yet due, and the partnership property may be sold thereby. Such a judgment would be valid, even though the partner had no right, under the partnership agreement, to confess it, if the creditor was not aware of that fact. *Barnett's Appeal*, 2 **Walker**, 355. 2. A partner, by a warrant of attorney under seal, may confess a judgment against the firm for a firm debt, which will justify a levy and sale of the firm goods and his own in payment thereof, but not the separate property of the other partners. *Boyd vs. Thompson*, 153 Pa., 78. 3. One partner may bind the firm by a confession of judgment under seal in the firm-name for a firm debt, and on an execution upon such judgment, partnership assets may be sold, though the judgment be stricken off as to the non-assenting partners. *Hershey vs. Fulmer*, 3 Pa. County, 442. *Bitzer vs. Shunk*, 1 W. & S., 340. *Cash vs. Tuzer*, *Idem*, 519. *Budd vs. Shoch*, 1 Pa. Dist., 584. *Franklin vs. Morris*, 154 Pa., 152. *Heft vs. Basford*, 3 Lancaster Review, 370. *Knight vs. Watrous*, 1 Luzerne Register, 110. *Simpson vs. King*, 14 W. N., 44. *Urey vs. Bair*, 5 York Record, 195. 4. It is beyond the implied powers of a partner to confess a judgment in the name of the firm by an instrument under seal for his individual debt. A judgment so confessed will be stricken off as to the firm and the other partners. *Heft vs. Basford*, 2 Pa. County, 278. *Williams vs. Jones*, 7 Kulp, 386. 4 Northampton Co., 24. 5. A judgment confessed by one partner in the firm name, though for a firm debt, is void against the others, but is good against the partner confessing it, and under it partnership goods can be taken in execution. Yet after the partnership

Partnership—Continued.

has been dissolved, if such a note is executed by one partner, the judgment therein against the firm and the other partners will be stricken off. *McCleery vs. Thompson*, 130 Pa., 443.

6. One partner cannot confess judgment against the firm. *Quillin vs. Lawrence*, 4 W. N., 239.

II. NEGLIGENCE IN DISSOLVING. Where a partnership is entered into for a stipulated period, neither partner can dissolve the firm at his own will and pleasure, on notice, without the consent of the other. *Von Tagen vs. Roberts*, 2 Pearson, 137.

III. NEGLIGENCE IN ENTERING JUDGMENT. 1. A judgment entered and indexed in the name of a firm, without designating the individual members, will be postponed to the claim of a subsequent lien creditor, without notice, whose judgment is properly indexed. Where, however, the subsequent creditor had notice of the existence of the prior judgment before the debt to him was contracted, he would not obtain such preference. *Hamilton's Appeal*, 14 W. N., 217. *King vs. Fox*, 2 W. N., 196. *Brady vs. Conway*, 3 W. N., 110. *Wharton vs. Rosengarten*, *Idem*, 258. 2. A judgment against a firm, entered on the judgment docket, without setting forth the Christian names of the several partners, is without effect as a lien, so far as respects subsequent purchasers and encumbrances without notice. *York Bank's Appeal*, 36 Pa., 458.

IV. NEGLIGENCE IN EXECUTION AGAINST. An execution against partnership property on a judgment confessed against himself by a partner, for a debt alleged to be due by the firm is irregular and will be set aside. *Vandegrift vs. Redheffer*, 10 W. N., 484.

V. NEGLIGENCE IN FORMATION. 1. Where a failing debtor takes his children into partnership without consideration other than services to be rendered in the business, the badge of fraud is apparent. *Cadbury vs. Brown*, 5 Phila., 43. 2. Under the act of June 2, 1874, a mode was provided by which individuals might invest a fixed sum in a business enterprise, without liability to loss beyond the sum so invested. Such association is called a joint stock association, having some of the character-

Partnership—Continued.

istics of a partnership, and some of a corporation. Three or more persons may agree to form such an association. Their agreement must be in writing for the information of the public, and must be signed and acknowledged by every member. It must set out the names of the parties and the title of the company, the total capital subscribed, and the amount subscribed by each member, and when and how paid. *Hill vs. Stetler*, 127 Pa., 161.

VI. NEGLECT IN JOINING PARTNERS IN ACTIONS AT LAW. It is error to join the administrators of a deceased partner as co-defendants with the surviving partner in a suit. *Hoskinson vs. Elliot*, 62 Pa., 404.

VII. NEGLECT IN LEGAL PROCESS. In *assumpsit* against three partners, all of whom were served with process, a trial, verdict and judgment against one of them, without taking an interlocutory judgment against the other two, is erroneous. *Nelson vs. Lloyd*, 9 W., 22.

VIII. NEGLECT IN LEVYING UPON PARTNER'S INTEREST. The act of April 8, 1873, provides a special form of proceeding, where it is sought to levy upon and sell the interest of a partner in the firm of which he is a member. The judgment must be entered in the county where the chief office of the partnership is or was last located, or if not entered there, then a *testatum facias* may issue upon such judgment. The *feri facias* must be a special writ to levy upon the interest of the defendant in such partnership and sell the same. *Hare vs. Comm.*, 92 Pa., 144. *Kame's Appeal*, *Idem*, 273.

IX. NEGLECT IN NAMES OF PARTNERS. The Christian names of the partners of a firm who had given a judgment signed with the firm name must be set out upon the judgment docket, on the entry of the judgment, in order to be a lien against subsequent purchasers and lien encumbrancers without notice. *Smith's Appeal*, 47 Pa., 128.

X. NEGLECT IN REPRESENTATION. 1. Even if in fact there be no partnership, one is liable as a partner if he represents to another that he is a partner, and thus obtains goods

Partnership—Continued.

from him for the partnership. A creditor is not concluded by the written agreement of the parties as to the relation they sustain to each other. *Reed vs. Kremer*, 111 Pa., 482. 2. A man who is not a member of a firm, may yet make himself liable to its creditors by holding himself out to such creditors as a partner. Yet in fact he does not become a partner; he is merely liable as a partner. *Tilge vs. Brooks*, 124 Pa., 182.

XI. NEGLIGENCE IN THE SALE OF A PARTNER'S INTEREST. One who at a sheriff's sale purchases the interest of a partner in the personal property of the firm, is not thereby entitled to take possession of any portion of the property. He can only sell the interest of the partner against whom the execution issued. He cannot take possession of any specific article of property. *Durburrow's Appeal*, 84 Pa., 404.

XII. NEGLIGENCE IN SEIZING GOODS OF THE FIRM. Under an execution against one partner, the sheriff can levy only on the right, title and interest of such partner in the property of the firm. He cannot seize and sell the partnership property on an execution against one of the partners. Each partner has an entire as well as joint interest in the whole of the joint property. *Vandike vs. Roskam*, 67 Pa., 334.

XIII. NEGLIGENCE OF CLERK. The fact that a clerk, salesman or agent of a partnership uses the firm name in transacting its business, without disclosing that he is not a member thereof, will not make him liable to those with whom he thus dealt, unless he held himself out as such. *Ihmsen vs. Lathrop*, 104 Pa., 365.

XIV. NEGLIGENCE OF COPARTNER. 1. The ground of liability of one partner for the acts of the others, is that of an implied general agency within the scope of the partnership. An incoming partner is not liable on the contracts of the firm made before he became a member. *Babcock vs. Stewart*, 58 Pa., 179. 2. There is an implied obligation among copartners, that their property shall be used for the benefit of the firm, and that no partner shall engage in any business which will deprive

Partnership—Continued.

the partnership of a portion of his skill or diligence, or capital which he is bound to employ in it. A partner is in a fiduciary relation to his fellows, and must account for all money received through the firm's business. *Bast's Appeal*, 70 Pa., 301. 3. One partner of a firm cannot make an assignment or sale of all the firm property in trust for the benefit of creditors against the consent of the other partner, he being present and capable of joining in such assignment. *Cleaver vs. Brenzel*, 1 Schuylkill Record, 321. 4. Within the scope of the partnership, each partner is agent of the others, and cannot divest himself of that character without their knowledge and consent. He cannot purchase property for the purpose of the association, and sell it at an advance without a full disclosure of all the facts. *Densmore Oil Co. vs. Densmore*, 64 Pa., 43. 5. Neglect of a copartner, served with process, to notify a partner not served of judgment and execution, subjects the former to an action. *Devall vs. Burbridge*, 6 W. & S., 529. 6. It is a principle of the common law, that a partner cannot bind his copartners by seal, but this is to be taken with some qualification. He cannot execute an instrument under seal, whereby a new and original obligation is imposed upon the firm. He cannot charge the firm by seal, but he may discharge it, and it seems to be now settled, that when a seal is not essential to the nature of a contract, and will not change its legal effect, the addition of a seal will not vitiate it. *Dubois' Appeal*, 38 Pa., 236. 7. One partner cannot maintain an action on the case against his copartners for damages to which he himself would be liable to contribute, for breach of contract by the partnership, nor for a partnership transaction, the partnership accounts being unsettled, except a bill in equity, or an action of account render. *Crow vs. Green*, 111 Pa., 637. 8. It is the duty of a partner who has agreed to indemnify his retiring copartner from all existing contracts of the firm, to ascertain the extent of a liability of which he has knowledge. If he fail to do so, his ignorance is no defence for not indemnifying his partner. *Farrington vs. Woodward*, 4 W. N.,

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146. 9. A sale of goods on credit to one partner in the course of the partnership business, is a sale to the firm, unless made contrary to an express notice by the other partner not to trust the firm on his account. *Feigley vs. Sponeberger*, 5 W. & S., 564. 10. If one partner sign and seal an instrument in the firm's name, and the other partner be present, assenting to it, he is as much bound, as if he had signed and sealed the paper. *Fichthorn vs. Bower*, 5 W., 159. *Overton vs. Tuser*, 7 W., 333. 11. Where one of two partners, lessees of a building, expends money against the protest of his copartner, in repairs and improvements, which neither increase nor preserve the firm assets, he is not entitled, without a subsequent ratification thereof, to charge such expenditures against the copartnership. *Gordon vs. Moore*, 132 Pa., 486. 12. A partner who negligently pays a debt claimed, but not due, cannot charge the payment to the firm. *Gordon vs. Moore*, 8 Pa. County, 289. *Moore's Appeal*, 1 Lackawanna Jurist, 338. 13. If a partner, being a trustee, improperly employs the money of his *cestui que* trust in the partnership business, or in payment of the partnership debts, this alone is not sufficient to entitle the *cestui que* trust to obtain repayment of his money from the firm. *Guillon vs. Peterson*, 89 Pa., 172. 14. If a note of the firm be given for the private debt of one of the partners to a party who knew it was not a partnership transaction, such party cannot recover from the firm, unless the remaining partners assent; but the paper is good against the firm in the hands of a *bona fide* holder. *Haldeman vs. Bank*, 28 Pa., 440. 15. An engagement by one partner to bind the partnership credit, in a transaction unconnected with, and not fairly within the scope of, the partnership, is, as to the other partner, fraudulent and void. *Hamill vs. Purvis*, 2 P. & W., 179. 16. It is well settled, that one partner cannot make a valid transfer of firm property, in payment of his individual debt, without the consent of his copartners, and where he does so with the intent to defraud firm creditors, the purchaser acquires no title as against said creditors. *Hartley vs. White*, 94 Pa., 31.

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17. One partner, under general articles of copartnership, has no authority to bind his copartners by deed, and a specialty given by one, in the name of the firm, binds only himself. A sealed note in the name of the firm, made by one partner, is not a satisfaction of the firm debt, unless accepted as the individual note of the partner. *Hoskinson vs. Elliott*, 62 Pa., 393.
18. One partner cannot bind his copartner by a sealed instrument; yet if he attaches a seal to the partnership named, and the other partner ratifies the instrument, even by parol, it becomes the deed of both. *Johns vs. Battin*, 30 Pa., 88.
19. The authority of partners is limited to the business of the partnership, and a partner cannot render the firm liable for a note for his individual debt, by including within it a small debt of the firm. *King vs. Faber*, 22 Pa., 21. *Bell vs. Faber*, 1 Grant, 31.
20. One partner cannot bind another, by admitting in the settlement of an account due by a debtor to the partnership, an account due by himself only, as a set-off. But if he sell part of the goods, as a payment of his individual debt, the other partner is bound by his act. *Kirkpatrick vs. Turnbull*, Addison's Rep., 259.
21. A partner must keep partnership funds unmixed with his own, and equally within the grasp of the other partners. He must deposit the funds of the firm in the partnership name, to exempt him from responsibility therefor in case of loss. *Lefever vs. Underwood*, 41 Pa., 505.
22. Each member is entitled to any benefit accruing from the conduct of others, and all are liable for the acts of each within the scope of the partnership business. *Livingston vs. Cox*, 6 Pa., 364.
23. One copartner is answerable for the wilful torts of others of the firm. Partners are liable for a trespass by themselves or their agents, employees or servants, in the legitimate conduct of the partnership business; or if the trespass be done by their agents or workmen, acting within the scope of their authority, or while in the employment of the firm. *McKnight vs. Ratcliff*, 44 Pa., 156.
24. If one partner, without the knowledge or consent of the other, make an absolute transfer to a stranger of partnership property not held for purposes of trade or sale, the

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other partner may maintain trover against the transferee. *McNair vs. Wilcox*, 121 Pa., 437. 25. One of several partners cannot subject the partnership property to levy and sale for his own indebtedness, by giving a judgment note in the firm name without the knowledge or consent of his copartners, even though the money was used by the partner as his contribution to the firm. *McNaughton's Appeal*, 101 Pa., 550. 26. In the absence of an express stipulation, partners are not entitled to compensation for their services, however unequal in value or amount; every partner being bound to work to the extent of his ability for the benefit of the whole. If the partnership suffer loss from the gross negligence, unskillfulness, fraud or wanton misconduct of any partner, he will ordinarily be responsible to the other partners. *Marsh vs. Geddes*, 20 **Pittsburg Journal**, 13. 27. While it is true each partner must work to the extent of his ability, yet where an express agreement exists that one partner shall do special duties, and he fails to perform them, held, that on a settlement of the firm accounts, he is chargeable with the value of such services. *Marsh's Appeal*, 69 Pa., 30. 28. Where land is held by a firm by deed expressing that it is partnership stock, an encumbrance against a member of the firm is not a lien upon any interest in it, so as to prevent the firm conveying to a purchaser clear of the encumbrance. *Meily vs. Wood*, 71 Pa., 488. 29. If a partner draw from the firm assets more than his share of the profits, and appropriates it to his own use, he is guilty of such fraud as will be restrained by injunction. *Moir vs. Emerick*, 3 **Montgomery Co.**, 161. 30. Each partner constitutes the other a general agent of the firm, with power to bind it, not only by his contracts, but by his acts in the scope of the business. It is not doubted that partners may be sued in trover, where they join in the conversion, and do they not join, where the act of one is the act of all? *Nisbet vs. Patton*, 4 R., 122. 31. A partner has no power to bind the firm for his own private debts, without the assent of his copartners. *Noble vs. McClintock*, 2 **W. & S.**, 152. 32. If money is borrowed or goods bought,

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or any other contract is made by one partner upon his own exclusive credit, he alone is liable therefor, and the partnership, although the money, property, or other contract is for its benefit and use, will in no manner be liable therefor.

North Pennsylvania Coal Company's Appeal, 45 Pa., 185.

33. The use by a partner of the moneys or credit of the firm for his private purposes is always to be condemned. A partnership may be dissolved on account of the impracticability of carrying it on, or because of permanent incapacity or gross misconduct of a partner. *Page vs. Vankirk*, 1 Brewster, 282.

34. If one of two partners gives a note in the name of both for his own private debt, it is a gross fraud on the other partner.

Porter vs. Gunnison, 2 Grant, 297. 35. After the dissolution of a partnership, a new promise by one of the partners, the only consideration of which was the original debt of the firm, will not take the debt out of the statute of limitations, so as to make the copartners liable. *Reppert vs. Calvin*, 48 Pa., 248.

36. One partner cannot, in the absence of special authority, bind his copartners jointly with himself to pay the debt of another. *Shaaber vs. Bushong*, 105 Pa., 514.

37. Where a partner in a commission firm bought lumber on his own account, and gave a note signed by him in the firm name, which note was endorsed over to a *bona fide* holder without notice that it was not given in the business of the firm, held, that the holder could recover against the firm. *Sedgwick vs. Lewis*, 70 Pa., 217.

38. Where, on the conclusion of the active business of a firm, one partner takes into his possession all the money of the firm and refuses to make a prompt settlement of the affairs thereof, he is chargeable with interest on the said moneys. *Steiger vs. Bradley*, 34 W. N., 123.

39. A partner cannot make a general assignment in trust for the benefit of creditors against the consent, or without the concurrence of his copartner, the latter being present and capable of acting in the matter. Still less can an authority be admitted in one partner to sell the entire property of the firm, when the object of the partnership was not trade, buying and sell-

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ing, but a business to which the continued ownership of the property sold is indispensable. An assignment is for the purpose of paying the debts, but a sale principally for division has not even that apology. *Sloan vs. Moore*, 36 Pa., 223. 40. One partner has not the power without the consent of his copartner to sell out the tools and all the assets of the firm, and thus terminate the partnership. A court of equity will interfere by injunction. Upon the dissolution of a partnership, if the firm do not agree as to disposition of the assets, the appointment of a receiver is of course. *Sloan vs. Moore*, 2 Pittsburg, 44. 41. One partner has no authority to bind the other partner by deed or otherwise, unless his authority is also under seal. *Snyder vs. May*, 19 Pa., 235. *Benly vs. Innis*, 17 Pa., 485. 42. Where one partner, holding notes due the firm, attempts to pledge them for his own private debts, the court will interfere to restrain him by an injunction. *Stockdale vs. Ullery*, 37 Pa., 486. 43. In order to allow firm property to be applied in payment of the individual debt of one partner, the consent of the other is necessary. Such consent may be inferred from a knowledge of the other partner, that the goods are being so applied, and his silence when he ought to speak. *Todd vs. Lorak*, 75 Pa., 155. *Leonard vs. Smith*, 162 Pa., 284. 44. Where a member of a firm, while insane, borrows money for the use of the firm, the firm is responsible, even though the money was appropriated to his own use by the lunatic. *Van Brunt vs. Taylor*, 3 Phila., 123. 45. If one partner clandestinely carry on a private trade or the same trade for his private advantage, and in a manner injurious to the true interests of the partnership, or employ the partnership capital or effects in a matter not the direct object of the association, he must account with his copartners for the profits resulting from such an employment of the common effects. *Waring vs. Cram*, 1 Parsons, 516. 46. The neglect of a partner to protect the property of a partnership, is not a ground for rescission of a contract of partnership, although it would be a cause for dissolution ; and the loss, if any, may be charged to the neg-

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ligent partner. *Whelen vs. Harrison*, 16 Phila., 143. 47. One of several partners has no authority to bind the firm, by signing the firm name to an instrument under seal. The partner who signs such instrument alone is bound. *Whitaker vs. Richards*, 25 W. N., 540.

XV. NEGLECT OF LIABILITY. A man who lends to a partner without knowing he is borrowing for the firm, may charge him individually in the first instance, and then, on learning the facts, proceed against the firm; but if the lender knew at the time that the money was borrowed by the partner for the firm, and yet showed his intention to rely on the separate credit of the partner, he cannot subsequently charge the partnership. *Sinkler vs. Lambert*, 5 Phila., 36.

XVI. NEGLECT OF NAMES OF PARTNERS. Under a judgment against the ostensible partners in the firm name, the interest of the partners not named will pass to the sheriff's vendee. *Carey vs. Bright*, 58 Pa., 71.

XVII. NEGLECT OF NOTICE OF DISSOLUTION. 1. When an ostensible member of a partnership retires therefrom, and wishes to shield himself from liability for future debts of the firm, it is necessary that personal notice of his withdrawal be given to all who have had dealings with the firm, and that notice be given by publication or otherwise to all others. *Clark vs. Fletcher*, 96 Pa., 418. 2. If a public notice is given by one partner of the dissolution of the firm, and parties ignoring it, place funds in the hands of the other former partner, they must take the consequence of their own imprudence. *Crawford vs. Willing*, 4 D., 285. 3. Where parties sell their business to another who continues the business at the same stand and with the same employees, actual notice should be given to all persons who had previous dealings with the firm. *Shaunce vs. McCrystal*, 162 Pa., 457. 4. Notice of the dissolution of a partnership given in a newspaper printed in the city or county where the business is carried on, is notice to all persons not previously dealing with the firm. But as to persons having previous dealing with the partnership, general

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newspaper notice is not sufficient. Actual notice in such case must be shown. No particular mode is prescribed by law for communicating notice to such parties. The mere fact that the party was a subscriber to the newspaper containing the advertisement, is insufficient. *Watkinson vs. Bank of Penna.*, 4 Wh., 482. *Robinson vs. Floyd*, 159 Pa., 165. *Little vs. Clark*, 36 Pa., 114. 5. A special notice of the dissolution of a partnership given to third persons is of no avail in a suit against the firm brought by one who had been accustomed to deal with them. A general notice by advertisement in a newspaper, which it did not appear the plaintiff was in the habit of taking, will not avail. *Williamson vs. Fox*, 38 Pa., 216.

XVIII. NEGLIGENCE OF PARTNERS TO COMPLY WITH THE TERMS. If the members of a limited partnership seek to shelter themselves from personal liability under the act of June 2, 1874, and its supplements, they must show a substantial compliance with the terms thereof; otherwise they will be held to the liability of general partners. *Cock vs. Bailey*, 140 Pa., 328.

XIX. NEGLIGENCE OF PARTNER TO JOIN IN A CONTRACT. Partners are bound by what is done by each other in the course of the partnership business. The act of one is the act of all. Partnership contracts differ from all other contracts, in which no one is liable, except he be privy to it. *Taylor vs. Coryell*, 12 S. & R., 248.

XX. NEGLIGENCE OF SURVIVING PARTNER. If the surviving partner neglects or refuses to proceed within a reasonable time to close up the business of the firm and settle its concerns, the court of chancery will take the property out of his custody, and commit it to the care of a receiver to sell it. *Holden vs. McMakin*, 1 Parsons, 270.

XXI. NEGLIGENCE TO ACKNOWLEDGE. One who agrees to advance money to a firm, receiving a share of the profits in lieu of interest, does not *ipso facto*, become a partner, since the act of April 6, 1870, if he has not held himself out to the world as a partner; especially where he has never received any profits. *Hart vs. Kelley*, 83 Pa., 286.

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XXII. NEGLECT TO COLLECT FIRM ASSETS. When partners on a settlement divide the assets consisting of evidences of indebtedness belonging to the firm, unless it is otherwise expressly agreed, they remain liable respectively for subsequent losses from the insolvency of the debtors or other causes not attributed to negligence in either. The division, *prima facie*, is for the convenience of collection, only throwing upon the partner who receives the assets the obligations of good faith and reasonable diligence. *Knox vs. Sprecher*, 68 Pa., 420.

XXIII. NEGLECT TO COMPENSATE WORKING PARTNER. When the co-partnership agreement contemplates that one partner shall manage the business, or do more than his share of the work, it is easy to provide for his compensation in the agreement itself; and if no such stipulation is then made, the law will not imply one. Even where a liquidating or surviving partner settles up the business, he is not entitled to compensation for doing so, although he performs all the services. *Lindsey vs. Stranahan*, 129 Pa., 639. *Shriver's Appeal*, 35 Pittsburg Journal, 243.

XXIV. NEGLECT TO COMPLY WITH THE STATUTE. An omission by a partnership company, limited to comply with the requisites of the act of June 2, 1874, does not render the members liable as general partners, to creditors who dealt with the association as such. *Eliot vs. Himrod*, 15 W. N., 77.

XXV. NEGLECT TO CONSTITUTE. 1. An agreement that one shall receive a commission on sales does not constitute a partnership. *Walter's Appeal*, 1 Chester Co., 278. 2. To constitute a partnership, there must be a community of interest and participation in the profits. *Boffenmyer's Estate*, 8 Lancaster Review, 257.

XXVI. NEGLECT TO DISAVOW. 1. A man who is not really a member of a firm, may become answerable as such, either by holding himself out as a partner, leading the plaintiff to act on his declarations, or by proof of specific declarations to the plaintiff followed by action. *Craig vs. Warner*, 3

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Phila., 298. 2. If one holds himself out or knowingly suffers himself to be held out as a partner, on the faith of which others trust or enter into a contract with the firm, he is responsible, though not a partner. Estoppels shut the mouth of a party, whether his original act was intended to deceive or not. *Kirk vs. Hartman*, 63 Pa., 97. 3. Persons holding themselves out to third parties, dealing with them as partners in a single enterprise, will be bound to such third parties as partners, even though there may be no agreement of partnership, *inter sese*. *Shafer vs. Randolph*, 99 Pa., 250. 4. Where parties in business together declare in a contract that the agreement is not to be construed as creating a partnership, the court, in considering the rights of creditors, will be governed by the effect of the contract relation created, and not by the name given to the association. *Poundstone vs. Hamburger*, 139 Pa., 319. 5. If a note be given by one partner in the name of the firm, for his own private debt, and the other partner, after knowledge, does not dissent or give notice to the payee, that he will not be liable, he shall be bound. *Foster vs. Andrews*, 2 P. & W., 160.

XXVII. NEGLECT TO FORM. A contract by two parties to perform a particular piece of work, is not in itself a contract of partnership *inter se*. One cannot be fixed with liability as a partner, unless the alleged act was done by him or by his consent and was known to the person seeking to avail himself of it. *Denithorne vs. Hook*, 112 Pa., 240.

XXVIII. NEGLECT TO GIVE NOTICE OF WITHDRAWAL. A partner withdrawing from a firm, must give notice of such withdrawal; otherwise he remains liable for its subsequent debts. Even though the partners do business as a bank, they are all individually liable for its debts. A new partner is not liable for the antecedent debts of the firm, unless he has agreed to assume them. *Shamburg vs. Ruggles*, 83 Pa., 148.

XXIX. NEGLECT TO INCLUDE ALL THE PARTNERS IN A SUIT. By the common law, a judgment against one or more of several partners on a partnership note merges the original cause

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of action, and is a bar to another suit against the remaining partners who were not served with the writ of summons. Pennsylvania has abrogated this rule on account of its injustice, and allows a subsequent suit against the partner or partners not originally summoned. *Bennett vs. Caldwell*, 70 Pa., 257.

XXX. NEGLECT TO PAY DEBTS. Partners are liable jointly at law for the debts and engagements of the firm, but in equity their liability is not only joint but several, except under special circumstances. This liability as between themselves they can modify and limit by contract, but it is not settled in this state how far they can limit their liability to third persons. *Beaver vs. McGrath*, 50 Pa., 482.

XXXI. NEGLECT TO PAY THE CAPITAL SUBSCRIBED. In order to constitute a valid organization under the limited partnership act of June 2, 1874, before business is begun some part of the subscribed capital must be paid in, and the amounts should be set forth. *Hill vs. Stetler*, 21 W. N., 255.

XXXII. NEGLECT TO PAY SURVIVING PARTNER. A payment by a debtor of the firm to the executor of a deceased partner, is no satisfaction to the surviving partner, who has the sole right of suing for and of receiving moneys due the firm. *Wallace vs. Fitzsimmons*, 1 D., 250.

XXXIII. NEGLECT TO PLEAD STATUTE OF LIMITATIONS. The acknowledgment of a debt, barred by the statute, by a partner after the dissolution of the partnership, does not revive the debt as to the other partners. *Searight vs. Craighead*, 1 P. & W., 135.

XXXIV. NEGLECT TO PUBLISH DISSOLUTION. 1. Ordinarily, when partners sell out to a stranger, no notice of the dissolution would be necessary to a party dealing with the purchaser. But where the partners sold out to a son of one of the partners, who had previously been its clerk and who made no visible change in the sign, a former creditor of the firm was not affected by the change of ownership, without actual notice, or the proof of such facts as warranted the belief of knowledge. *Newcomet vs. Brotzman*, 69 Pa., 185. 2. To

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affect the community with knowledge of the dissolution of a partnership, the proof of the dissolution should be clear, distinct and unambiguous. *Brown vs. Clark*, 14 Pa., 469.

XXXV. NEGLECT TO PROVE. 1. Participation of profits is not conclusive proof of the existence of a partnership relation, but is cogent evidence on the question. It puts the defendant on proof explanatory of the fact. *Darling's Estate*, 7 Kulp, 323. 2. The best evidence of the existence of a partnership is the contract creating it; its existence may be inferred: (1) from proof of contribution to the partnership stock (2) from participation in profits; and (3) from the acts and declarations of the parties. *Gibb's Estate*, 157 Pa., 59. *Hart vs. Kelley*, 8 Lancaster Bar, 153. 3. The burden is upon the plaintiff to prove the existence of a partnership in a suit against several joint defendants, based on their alleged liability as partners; until such proof is given the defendants are not called upon to enter upon their defence. *Halstead vs. Curtis*, 29 W. N., 129. 4. One who has an interest in the business of a firm or in the capital invested, save that he is to receive a share of the profits as compensation for services or for money loaned for the benefit of the business, is not a partner and cannot be held liable as such by a creditor of the firm. *Waverly Bank vs. Hall*, 150 Pa., 466. 5. Participation in profits is the most generally accepted test of the existence of a partnership, and though its presence is not conclusive in favor of it, its absence may be regarded as conclusive against partnership. *Walker vs. Tupper*, 152 Pa., 1. 6. At common law, an agreement to advance money in a business concern, and to receive a share of the profits, makes the lender a partner in the business so far as concerns third persons. *Wessels vs. Weiss*, 166 Pa., 490.

XXXVI. NEGLECT TO RECORD SCHEDULE OF PROPERTY. If parties seek to have all the advantages of a partnership, and yet limit their liability to creditors, they must comply strictly with the act of June 2, 1874, and its supplements. The object of the act of May 1, 1876, requiring a schedule of

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property contributed to such limited partnership to be recorded, was to enable creditors to ascertain precisely of what the property consisted and to judge of its value. *Moloney vs. Bruce*, 94 Pa., 249.

XXXVII. NEGLECT TO REGISTER. In order to take advantage of the non-joinder of a partner, the partnership must be registered. Foreign firms cannot be held to registration under our law. *Pleasant Valley Wire Co. vs. Wilson*, 1 W. N., 5. *Shumway vs. Chrisman*, 2 W. N., 65.

Party Walls.

I. NEGLECT BY INSERTING WINDOWS. 1. A party wall, within the meaning of the act of 1721, is a solid wall. A wall built with openings for windows is not such a wall, and equity will, by injunction, restrain its erection. *Vansyckle vs. Tryon*, 6 Phila., 401. *Dutz vs. Phillips*, 137 Pa., 203. 2. No length of adverse uses will deprive an adjoining owner of his right to close windows in a party wall. *McCall vs. Barrie*, 14 W. N., 419.

II. NEGLECT IN BROADENING. The fact that an owner of a building or his predecessor in title has built a party wall encroaching but four inches on his neighbor's land, will not, in the absence of an agreement to the contrary, prevent him from subsequently building a wall encroaching to the limit authorized by the act of May 7, 1855, which is six and one-half inches for a brick wall. *Deringer vs. Hotel Co.*, 155 Pa., 609.

III. NEGLECT IN CONSTRUCTION. Equity will not entertain a bill for the removal of a party wall which is defectively constructed. There is a complete remedy at law under the statutes. *Mulligan vs. Fitzpatrick*, 28 W. N., 151.

IV. NEGLECT IN DISTURBING. An adjoining owner of real estate in Philadelphia, may maintain the party wall in such form as to support the building he proposes to erect. In the present case, he removed the wall and proceeded to build a new wall. *Barns vs. Wilson*, 116 Pa., 303.

Party Walls—Continued.

V. NEGLIGENCE IN ERECTING. 1. A builder who, without a permit, erects a party wall of greater thickness than is required by the height and character of the building, cannot place one-half of it on the adjoining lot. The building inspectors may, in their discretion, because of the nature of the ground or the intended use of the building, require the erection of a thicker wall than usual. *Kirby vs. Fitzpatrick*, 168 Pa., 434. 2. A party wall is not required to be continuous or uninterrupted in length or uniform in height. The first building may recede from the party wall foundation. *McCall vs. Barrie*, 17 Phila., 312. 3. A party wall, erected by A, projected unintentionally in several places slightly beyond the proper line over land of B, who was erecting a building at the same time. He knew the wall was projecting, but went on and paid for his share. A completed his building without correcting the projection. The court, under the circumstances, refused a decree to take down the wall, although admitting that the occupation unlawfully of a portion of B's lot did not convey any title to it to A, but that B retained the right to recover damages for the trespass. *Mayer's Appeal*, 73 Pa., 164. 4. Where a party has laid a foundation, extending as a party wall on his neighbor's lot, he could not, by erecting a wall wholly within his own line, prevent the erecting from being a party wall. He was bound to make it a solid wall; by making openings in it, he became a trespasser. *Milne's Appeal*, 81 Pa., 54. *Western Bank's Appeal*, 102 Pa., 170. 5. A party wall in Philadelphia must be a solid wall of brick or stone, without openings; otherwise, the first builder is a trespasser. A party wall with windows is a nuisance, and is within the restraining powers of equity. *Vollmer's Appeal*, 61 Pa., 118.

VI. NEGLIGENCE IN LEAVING RECESSES. Where a party erected a solid party wall, sixteen feet and continued it as a solid wall to the height of seventy feet, except in three places, where he receded from the party wall nine feet, in order to leave recesses for light and air; held, that he had the right to erect the wall with such reces-

Party Walls—Continued.

ses, and an injunction would not be awarded. *McCall's Appeal*, 16 W. N., 95.

VII. NEGLECT IN LOCATION. A wall between two buildings of adjoining owners, used as a common wall continuously for a period of more than twenty-one years, becomes a party wall to the properties, whether equally upon the lot of each, or wholly upon the lot of one owner. *McVey vs. Durkin*, 136 Pa., 418.

VIII. NEGLECT IN REBUILDING. 1. The owner of a partition wall, in which the owner of the adjoining property has an easement for the support of his building, may lawfully take down and rebuild said wall when necessary for improvements, if by so doing he does not attempt to destroy the easement. The temporary inconvenience resulting from such proceeding will not justify an injunction. *Barnes vs. Loch*, 4 Montgomery Co., 149. 2. When an existing party wall in Pittsburg is torn down and replaced, solely because it is unsuited for a new building to be erected by one of the adjoining owners, the other cannot be compelled to contribute to the cost of the new wall, so long as he makes no use of it different from his use of the old one. *Hoffstot vs. Voight*, 146 Pa., 632.

IX. NEGLECT IN TEARING DOWN. Malicious mischief may be inferred from the wantonness or cruelty of the act, or from the wilful disregard of the rights of others, as in tearing down a party wall between two dwellings previous to official condemnation. *Comm. vs. Strode*, 27 W. N., 437.

X. NEGLECT IN USING. 1. The only use which can be made of a party wall is to place joists in it, or to support the roof of a building. Any other use of it, such as painting a sign on the side next the adjoining property may be restrained by injunction. In this state, a party wall must be solid, without windows or other openings for light and air. No length of enjoyment of such windows will give a prescriptive right to continue them, but the adjoining owner may close them up at any time. A party wall is not required to be continuous in length or uniform in height. *McCall vs. Barrie*, 15 W. N., 28.

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2. The use by one of two contiguous lot owners of a party wall erected by the other, by cutting holes therein and inserting the girders and beams of a new building, without first having made compensation for such use, is an injury for which an action of trespass will lie, not only against the person actually committing the injury, but also against any person by whose order or authority the trespass was committed. *Ritter vs. Sieger*, 105 Pa., 400.

XI. NEGLIGENCE OF UNIFORMITY. A party wall is not required to be continuous or uniform in height. The owner of a property may recede from the party-wall foundation at any height, and build the upper part of the outer wall of his building upon his own ground on a foundation wholly within his own line. *McCall vs. Barrie*, 1 Lancaster Review, 267.

XII. NEGLIGENCE TO EXTEND. Where a party wall is placed back from the line of the street by the first builder, and it has so remained for fifty years after the erection of an adjoining building, the owner of the house first built cannot extend the party wall to the line of the street without the assent of the other party. *Duncan vs. Hanbest*, 2 Brewster, 362.

XIII. NEGLIGENCE TO PAY FOR. Where two parties agree to build a party wall, and one of them causes it to be erected, the other will be prevented by injunction from using it until he has paid his share of the cost. *Huidekoper vs. Masson*, 19 Pittsburg Journal, 113.

XIV. NEGLIGENCE TO PROPERLY SUSTAIN. The keeping of a wall in secure condition was a common duty, and a failure to do so a common neglect. When an injury has resulted from the concurrent negligence of two or more persons, they are jointly responsible. *Klauder vs. McGrath*, 35 Pa., 128. *Little Schuylkill Nav. Co. vs. Richards*, 57 Pa., 148.

XV. NEGLIGENCE TO PROTECT. The right to fasten joists in a party wall is a servitude, and the extent it damaged the property should be left to a jury. *Stern vs. Saeger*, 24 Pittsburg Journal, 90.

Party Walls—Continued.

XVI. NEGLECT TO STRENGTHEN. Under the act of April 11, 1856, the owner of a party wall cannot be compelled to take it down at his own expense, because it is not of sufficient strength for an erection his neighbor desires to make. *Ferguson vs. Fallows*, 2 Phila., 168.

XVII. NEGLECT TO USE. To make an adjoiner liable, he must actively use the party wall; a mere passive benefit is not sufficient. *Wetherill vs. Horan*, 5 Pa. County, 190.

Patents.

I. NEGLECT BY INFRINGING. 1. All the owners of a patent must be made parties to a suit against infringers. *Jordan vs. Dobson*, 7 Phila., 533. 2. A license to use a process ceases with the death of the original patent, and the use after the patent is extended is an infringement. *Wetherill vs. Zinc Co.*, 9 Phila., 385.

II. NEGLECT IN DESCRIPTION OF INVENTION. Where a reissue is sought to cover a patent invalid owing to a defective or insufficient specification, an enlargement of the claim can be founded on nothing but a clear mistake and a speedy application for correction. *Combined Can Co. vs. Lloyd*, 15 Phila., 481.

III. NEGLECT IN GRANTING. Where two patents were obtained for the same invention, the one last granted is void, although it may have been first applied for. *McMillan vs. Rees*, 27 Pittsburg Journal, 130.

IV. NEGLECT IN NAME OF PATENTEE. A mistake in the Christian name of a grantee of a patent will not render the patent invalid, if his identity is otherwise established. *Northwestern Co. vs. Extinguisher Co.*, 10 Phila., 227.

V. NEGLECT IN SUIT FOR INFRINGEMENT. A service of a subpoena in a suit in the federal court in equity for the infringement of letters patent, will be set aside when made upon a defendant domiciled in another district, while he is temporarily within the district of which the complainant is an inhabitant, and in which the bill is filed. *Harvey vs. Seegar*, 28 W. N., 300.

Patents—Continued.

VI. NEGLIGENCE OF JOINT OWNER. One joint owner of a patent cannot sue another for infringement or compel contribution of profits. *Battin vs. Martin*, 10 Lancaster Review, 209.

VII. NEGLIGENCE OF LICENSEE. A licensee of a patent cannot use the machine beyond the place defined in his license. The purchaser of a licensee's interest at a judicial sale acquires no greater interest. *Chambers vs. Smith*, 7 Phila., 575.

VIII. NEGLIGENCE OF NOVELTY. 1. Where one claim embraces only a quality or feature which is covered by another claim as an inseparable incident, such claim is void. *Combined Can Co. vs. Lloyd*, 15 Phila., 485. 2. Where the main defence is a want of patentable novelty, the presumption is in favor of the patent, and to overthrow this presumption, the evidence must show a prior state of the art sufficient to justify anticipation. Where there are serious defects in the old machine, which are remedied in the new, the improvement, though simple, may be novel and productive of an essentially new result. *Dusch vs. Medlar Co.*, 18 Phila., 549. *Osborne vs. Glazier, Idem*, 543. 3. Where an invention is attacked on the ground of want of novelty, the fact that such an invention was in existence for years, but was never made use of except for experiment, and that unfrequently, is a strong proof that such prior articles was not identical with the complainant's invention, which is of practical utility. *Parham vs. Machine Co.*, Leg. Gaz. Report, 145. *Salt Co. vs. Thomas, Idem*, 275. 4. Where it is proved that the process described and claimed has been practiced by others anterior to the date when the patentee claims to have discovered it, the bill in equity will be dismissed. *Passaic Zinc Co. vs. Spear*, 23 Pittsburg Journal, 34. *Shoup vs. Henrici, Idem*, 123. 5. A patent is rendered invalid by a prior published description, only where that description was sufficient to give to the public a practical knowledge of the invention claimed. *Roberts vs. Dickey*, 19 Pittsburg Journal, 139. 6. If a patentee be not the first or original inventor, in reference to all the world, his patent is void, even if he had no knowledge of the previous use or

Patents—Continued.

description of the invention. And the law is the same as to an improvement. *Street vs. Silver*, Brightly's Rep., 96.

IX. NEGLECT TO APPLY FOR. 1. The public use, by an inventor himself, of his invention for more than two years prior to his application for a patent, deprives him of his right thereto, and a patent obtained after such use is invalid. *McMillin vs. Barclay*, 3 Pittsburg, 377. 2. A first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use two years before he applies for a patent. The mere speculation of a philosopher or mechanic, never put into actual practice or operation, will not deprive a subsequent inventor, who has by his labor put it into practice, of the reward due to his ingenuity and enterprise. *Rich vs. Lippincott*, 1 Pittsburg, 31.

X. NEGLECT TO ENJOIN VIOLATION. An injunction will not be granted to restrain the violation of a patent or copyright, where the defendant has been in possession a length of time, claiming by adverse title, until the right is first settled by law; nor will it be granted in any case, where the party applying for it has not shown good faith, conscience, activity and diligence, nor where there is any doubt as to the facts. *Cooper vs. Matthews*, 3 Clark, 178.

XI. NEGLECT TO FULLY DISCLOSE INVENTION. If the patentee does not disclose his entire invention, he will not be allowed subsequently to expand into a general expression, what was before limited in a particular form. A principle is not patentable, but its practical application to some useful purpose constitutes the invention. *Detmold vs. Reeves*, 5 Clark, 99.

XII. NEGLECT TO GRANT INJUNCTION. No interlocutory injunction should issue, unless the complainant's title and the defendant's infringements are admitted, or are so palpable and clear that the court can entertain no doubt on the subject. The chief object of issuing such writ before the final hearing of a cause, is to prevent irreparable mischief, not to give the plaintiff the means of enforcing a compromise on his own terms. *Parker vs. Sears*, 4 Clark, 443.

Patents—Continued.

XIII. NEGLECT TO ISSUE. A mere aggregation of old parts, without any new result, is not patentable. Two things are necessary to secure a patentable combination: first, a novel assemblage of parts establishing invention; second, the co-operation of the parts in producing a new result. *Hoffman vs. Young*, 14 Phila., 428. *Comm. vs. Boley*, 1 W. N., 303.

XIV. NEGLECT TO OBTAIN. There being no property in mere ideas, they may be stolen and used with impunity. A monopoly cannot be enjoyed without a patent. One who discovers, even by dishonorable means, what another has invented, may make use of the information, if no patent has been obtained. But the rule is different when the inventor has confided his idea to another person for a specific purpose. Then a trust is created. *Kortenhaus vs. Watch Co.*, 17 Phila., 134.

XV. NEGLECT TO PAY ROYALTIES. 1. The courts of this state have exclusive jurisdiction to enforce a contract to pay royalties for the use of a patented invention, when the parties are both residents of the state. The dispute in such cases does not arise under any act of congress, nor does the decision depend on the construction of any law in relation to patents. No act of congress regulates contracts of this kind, and the rights of the parties depend upon common law and equity principles. *Hubbard vs. Allen*, 123 Pa., 198. *Hubbard vs. Palmer*, 23 W. N., 166. 2. Where a person has agreed to pay royalties on all sales he may make of an unpatented device, he cannot allege as a defence in an action for the royalties, that subsequently the device was refused at the patent office. *Ingraham vs. Schaum*, 157 Pa., 88.

XVI. NEGLECT TO PROTECT. If one employed by another, whilst receiving wages, experiments at the expense of his employer, constructs an invention and permits his employer to use it, without compensation paid or demanded, and then obtains a patent, a license to the employer to use the patent will be presumed. *Slemmer's Appeal*, 58 Pa., 156.

XVII. NEGLECT TO PROSECUTE APPLICATIONS. A man may justly be treated as having abandoned his application for

Patents—Continued.

a patent, if it be not prosecuted with reasonable diligence. *Adams vs. Jones*, 2 Pittsburg, 73.

XVIII. NEGLECT TO RECORD ASSIGNMENT. The failure to record an assignment at the Patent Office, does not impair its validity as between the parties and against strangers, and it is only necessary by way of notice to purchasers. *Hall vs. Spear*, 1 Pittsburg, 513.

XIX. NEGLECT TO RESTRICT CLAIM. Under cover of securing his own invention, a patentee cannot expand his claim so as to embrace the invention of another ; such attempt might imperil his title to the product of his own mechanical skill. *Windsor Screen Co. vs. Boughton*, 10 Phila., 251.

XX. NEGLECT TO USE INVENTION. A prior invention, to defeat a subsequent patent, must have been reduced to practical use. It is not enough that the idea was conceived, nor is an abandoned experiment sufficient. *Roberts vs. Torpedo Co.*, 3 Brewster, 558.

Pavements.

I. NEGLECT BY ERECTION OF RAILING. For personal injuries received by the plaintiff when falling upon an icy street and striking his hand upon the point of a railing, a lawful structure upon the sidewalk, the owner of the property is not liable. *Kelly vs. Bennett*, 132 Pa., 218. 25 W. N., 368.

II. NEGLECT IN CONSTRUCTING. 1. The city is not liable for injuries received by a fall from a high sidewalk, neither built nor accepted by municipal authority, in a rural district. *Devlin vs. City*, 13 W. N., 338. 2. Whether a plank sidewalk eight feet wide, raised three or four feet above the surface of the ground in a village is sufficiently safe without side railings for pedestrians, is a pure question of fact to be determined by a jury. If it was manifestly dangerous, the citizen should walk upon the roadway at such point. *Forker vs. Sandy Lake Borough*, 130 Pa., 124.

III. NEGLECT IN EXCAVATING. 1. When in an action for damages from injuries from a fall of the plaintiff into a trench

Pavements—Continued.

cut across a city pavement, it was shown that the defendant was lawfully, carefully and rapidly engaged in doing the work, and that the plaintiff could not have failed to see the obstruction, the jury should be instructed to find for the defendant.

Barnes vs. Sowden, 119 Pa., 53. 2. An owner who excavates a sidewalk for the purpose of constructing a coal vault under the sidewalk, is bound to have it securely fenced, or he will be liable for any accident resulting from his negligence to do so. *Hohman vs. Stanley*, 2 Lancaster Bar, No. 37.

3. The sidewalk of a street is as much a part of the highway as the cartway, and a water company with the consent of the city, has a right to lay water pipes under the sidewalk, on payment of damages to the abutting owner for the laying of the pipe and interruption of access. This does not include consequential injury due to the proximity of the pipes. *Provost vs. Water Co.*, 162 Pa., 275.

4. Where an excavation in a pavement on a public highway was left so unguarded, that a pedestrian walking down the street at night and coming upon a soft sidewalk, stepped toward the cellar side to gain a firmer footing, and without negligence on his part fell into the excavation and was killed by the fall, the owners of the property are liable in damages. *Allen vs. Willard*, 57 Pa., 374.

IV. NEGLIGENCE IN LEAVING CELLAR WINDOW UNCOVERED.

Where the opening of a cellar window projected but sixteen inches on the sidewalk, and hence was within the line of the door steps, it was not negligence in the owner of the premises to leave it uncovered. No prudent person walks within sixteen inches of the houses when passing over the sidewalks of a city. It cannot be done without peril, and persons using public streets should use due caution. There is hardly a street where, by reason of some slight inequality in the pavement, a trifling hole or a loose stone, the passer-by may not fall and sustain injury. *King vs. Thompson*, 87 Pa., 365.

V. NEGLIGENCE IN OBSTRUCTING. 1. The owner of a premises is liable in damages for injury resulting from the careless-

Pavements—Continued.

ness of his workmen in leaving over night on the public footwalk a pile of dirt, which resulted in injury to the plaintiff, who fell over the same. *Baird vs. Pettit*, 70 Pa., 477. 2. The owner of a lot in a village set a curb over seven feet within the street, laid a brick pavement between the curb and his lot, convenient for pedestrians, and planted shade trees and two hitching posts at the outside edge of the pavement. Held, that this did not constitute a nuisance. *Comm. vs. Houck*, 11 W. N., 559. 3. It is a public nuisance and indictable at common law, to place on the sidewalk of a public street a stall for the sale of fruit and confectionery, although the defendant pays rent to the owner of the adjoining premises. *Comm. vs. Wentworth*, 4 Clark, 324. Brightly's Rep., 318. 4. A city is not responsible for dangers arising from structures on the sidewalk, which are not in themselves unlawful, and which dangers are of an occult character. *Eisenbrey vs. Phila.*, 19 Phila. 504. 5. Where a pile of empty barrels were negligently left standing on a pavement, and a boy of seven years in climbing on them to reach an awning rod, slipped and fell, held, that as the improper use of the awning fixtures was the cause of the injury, he could not recover damages from the city for not having the barrels removed. *Gaughan vs. Philadelphia*, 119 Pa., 503. 6. Footways are under municipal control, and the authorities may determine the extent to which sidewalks may be obstructed by cellar doors, doorsteps, awnings, bay-windows, cornices and the like. This power must be exercised under regulations that are general and uniform, reasonable and certain, and in conformity with the laws. An individual permit will not suffice. *Livingston vs. Wolf*, 136 Pa., 519. 7. Where a city ordinance provides that it shall be unlawful to place any goods for sale upon the footway in front of any house to a greater distance than four feet and three inches, it implies that goods may be placed for sale within those limits. *Philadelphia vs. Sheppard*, 158 Pa., 347. 8. Occupants of places of business upon a public street have a right to use the

Pavements—Continued.

sidewalk in front of their premises in receiving and sending out merchandise. But this right must be exercised with a due regard to the rights of pedestrians and in a reasonable manner. No precise rule can be laid down as to the length of time a person, in such use of a sidewalk, may allow his property to remain thereon without incurring the charge of negligence; the question is for the jury. *Vallo vs. Express Co.*, 147 Pa., 404.

VI. NEGLIGENCE IN BLOCKING WITH GOODS. The public has the right to the proper use of every portion of a public highway. The employees of stores and warehouses should use care in transferring goods from a wagon in the street. *Stewart vs. Alcorn*, 2 W. N., 401.

VII. NEGLIGENCE IN TRAVERSING. 1. Where one diverges from the ordinary travelled portion of a sidewalk and attempts to pass over portions of the edge that are usually somewhat obstructed by stepping stones, hitching posts, hydrants or trees, he must exercise a greater degree of caution to prevent accidents, and if he fails to do so and is injured, the law will not allow him damages. *Allegheny vs. Gilliam*, 30 *Pittsburg Journal*, 461. 2. Plaintiff having choice of two pavements, on opposite sides of the street, one known by her to be defective and dangerous, the other to be safe, chose the former. Held, in a suit by her for injury received on the defective sidewalk, there could be no recovery of damages. *Murphy vs. Guardville*, 16 Pa. County, 153. 3. The reasonable care which the law exacts of all persons in whatever they do involving the risk of injury, requires travelers, even on the footways of public streets, to look where they are going. The duty of vigilance is as obligatory upon citizens, as upon the municipality. Plaintiff fell at a street crossing by stumbling over a raised footwalk, which had she looked, she could readily have seen and surmounted. Held, that she was guilty of contributory negligence. *Robb vs. Connelville*, 26 W. N., 517. 137 Pa., 42.

VIII. NEGLIGENCE IN UNDERMINING. An owner who undermines a pavement in order to construct a coal-vault to connect

Pavements—Continued.

with his cellar, is bound to have it securely fenced while the work is progressing. If a pedestrian falls in the excavation and is injured, the owner of the premises is liable for damages, unless he can clearly shift the responsibility upon some one else. *Homan vs. Stanley*, 66 Pa., 464.

IX. NEGLECT OF SERVICE OF NOTICE TO PAVE. An ordinance of Philadelphia required owners to pave in front of their property, and on neglect, after twenty days' notice, the city should pave, and file a lien for the cost. A notice to pave was placed on the premises, under a stone which covered it. Held, not to be a sufficient notice to the owners. *Philadelphia vs. Edwards*, 78 Pa., 62.

X. NEGLECT TO ALTER THE CURB. Where paving the footway and curbing has been done by a property owner upon the requirement of the authorities, a subsequent narrowing of the street and consequent widening of the pavement by order of councils must be done at the expense of the city and not of the property owners. *Wistar vs. Philadelphia*, 80 Pa., 505.

XI. NEGLECT TO CONSTRUCT. 1. Under the borough act of April 3, 1851, the owners of property fronting upon a street, may be required to grade, curb, pave and gutter the sidewalks fronting their premises; but a demand upon such property owner to construct the sidewalk, and his refusal or neglect to do so, are a prerequisite to the acquisition of a lien by the borough for the cost of a sidewalk constructed by it; but it is unnecessary to aver such demand and refusal in the claim filed. *Mount Pleasant Borough vs. R. R.*, 138 Pa., 365. 2. Where the authorities of a borough after notice received of the dangerous condition of a sidewalk, neglect to pave it, the borough is liable in an action for injuries received by a pedestrian in falling upon it, unless he has been guilty of contributory negligence. *Shenandoah Borough vs. Erdman*, 21 W. N., 553. 3. A provision in the charter of a charitable association, that its property should be free from taxation, does not exempt the real estate of the institution from liability for a municipal claim, duly filed, for the cost of construct-

Pavements—Continued.

ing a new sidewalk. *Wilkinsburg Borough vs. Home*, 131 Pa., 109.

XII. NEGLIGENCE TO CLOSE CELLAR DOORS. 1. In an action for damages for injuries caused by falling over partly opened cellar doors on a sidewalk, evidence was adduced to show that the opening was close to the building line of defendant's house. Held, that plaintiff was guilty of contributory negligence. *Stackhouse vs. Vendig*, 166 Pa., 582. 2. Where the plaintiff slipped on the defendant's pavement, striking her head against a cellar door which had been left open a foot, she could not recover damages against the owner of the premises; the defendant's negligence, if indeed it existed, being the remote cause of the injury. *Hunter vs. Wanamaker*, 17 W. N., 232. *Simons vs. Thompson*, 2 W. N., 209.

XIII. NEGLIGENCE TO CLOSE COAL HOLE. 1. A property owner maintaining a coal hole in a city sidewalk is held to care and diligence to keep it secure. To charge the owner of the premises with notice of its condition, in order to affect him with negligence, it is not necessary that the defect should be so notorious as to be evident to pedestrians passing in the vicinity. As the cover of a coal hole is placed in the sidewalk, as a part of it, for persons to tread upon, a pedestrian is not chargeable with contributory negligence for failing to critically examine it before stepping upon it. *Dickson vs. Hollister*, 123 Pa., 421. 2. The owner of a factory employed a rigger to remove heavy machinery into the building from a railroad car. In prosecuting this work he opened a coal hole in the front pavement, into which to temporarily place a beam. Subsequently the beam was removed, and the hole left open a few moments, in which interval a lad walked into the hole and was severely injured. The owner of the factory not having interfered with or directed the work, was held not liable in an action brought against him for damages, as he had not had time to discover the dangerous condition of the sidewalk. *Harrison vs. Collins*, 86 Pa., 153. 3. For an injury resulting from neglecting to repair the grating over a coal hole in a

Pavements—Continued.

sidewalk, the tenant of the premises is primarily liable, unless the landlord has bound himself to make repairs. *Grier vs. Sampson*, 27 Pa., 184.

XIV. NEGLIGENCE TO GUARD AREA-WAY. 1. A municipality is liable in damages to a person who falls into an unguarded area-way opening on the sidewalk of a public street, where the area-way is so situated that persons using the sidewalk with ordinary care might by accident fall into it. *Feather vs. Reading*, 155 Pa., 187. 2. Unless a property owner is, from his own act or the situation of his property, bound to presume or anticipate that a pedestrian will need protection against the dangers of an open area, he will not be liable for failing to afford such protection. If his fault concur with something extraordinary and not likely to be foreseen, as in this case a frozen pavement, he will not be answerable. *Huffman vs. Musgrove*, 17 Phila., 362. *Hunter vs. Wanamaker*, *Idem*, 337. 3. An unguarded area-way extending from the building line far into the pavement, if located in a much-frequented street, is a public nuisance, and no lapse of time will legalize it. In an action against a municipality to recover damages for injuries sustained by falling into an unguarded area-way, there may be admitted in evidence a city ordinance requiring such openings to be properly guarded. *McNerney vs. Reading*, 150 Pa., 611. 4. Where a person is injured by falling into a dangerous opening in a sidewalk on premises in the possession of a tenant, the owner of the property is liable for the injury, where it appears that the dangerous opening was in existence when the lease was executed, and continued in the same condition to the time of the accident. *Reading vs. Reiner*, 167 Pa., 41. 5. It is for the jury to decide, whether a landlord should provide a permanent cover or guard to the entrance to an area-way in a street pavement. If he provided a movable cover and his tenant neglected to use it, the defendant would not be liable. So as to a coal hole in the pavement. *Simons vs. Thompson*, 2 W. N., 209. *Collins vs. Harrison*, *Idem*, 353. *Fox vs. Booth*, 1 W. N., 177.

XV. NEGLIGENCE TO PAY FOR GRADING. The owner of prop-

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erty abutting upon a new street, is not bound to pay for the grading of a footway. *Steelton vs. Booser*, 162 Pa., 630.

XVI. NEGLECT TO PAVE. 1. Under the act of March 22, 1865, on the petition of property holders, the councils of Philadelphia shall direct the highway department to notify the owners of property in West Philadelphia to have their footways paved in manner indicated, within thirty days thereafter. *Johnson's Appeal*, 75 Pa., 96. 2. A city ordinance of Philadelphia requires that the footways of all public streets shall be graded, curbed, paved and kept in repair at the expense of the owners of the ground fronting thereon. On failure to do so by the owner of the ground, the city shall do it at his expense, and may file a lien for the amount. *Philadelphia vs. Hospital*, 143 Pa., 373. 3. It was the duty of the owners of real estate on a city street to pave the sidewalk. It was their neglect of duty that compelled the city authorities to procure it to be done by contract. The plaintiff having contracted with the city to do the work, and the city having accepted the work as satisfactory, and the jury having found there was a substantial compliance with the ordinance, the defendants have no cause of complaint, as they are charged with no more pavement than was laid. *Watson vs. Philadelphia*, 93 Pa., 115.

XVII. NEGLECT TO PROTECT EXCAVATIONS. 1. A borough is liable in damages for an injury occasioned by its failure to place guards, lights or signals around an excavation which its servants had dug across the sidewalk. The question of contributory negligence is for the jury, if the party who fell into the trench knew of the condition of the sidewalk, and could have reached her destination through an adjacent alley instead of attempting to cross the sidewalk. *Biggs vs. West Newton*, 164 Pa., 341. 2. It is the duty of a municipal corporation to cover and keep in repair the covering over an excavation made by a private owner on a public highway, even if it be made for his private benefit. Such corporation is liable in damages for an injury resulting from the digging by a private owner of a trench across his pavement, if the corporation

Pavements—Continued.

had actual or constructive notice of its dangerous condition for a reasonable length of time. *Birmingham vs. Dorer*, 3 Brewster, 69. 3. Where a hole existed in a platform temporarily placed over a pavement, it is proper to submit to the jury, whether the city had notice of the defect. In the present case, a child of tender years was injured by falling into the hole. The fact that the child did not receive proper care and treatment after the injury would not entirely defeat recovery, but might reduce the amount of damages. *Bradford City vs. Downs*, 126 Pa., 622. 4. Where a carter, in unloading bricks, placed himself near an unguarded excavation in a sidewalk, into which he fell, he was held either guilty of contributory negligence in voluntarily taking a dangerous position, or if such position was necessary in the performance of his work, the risk was incident to the nature of his employment. *Dodger vs. Wanamaker*, 15 Phila., 167. 5. It is for the jury to determine the question of contributory negligence on the part of a pedestrian who carelessly falls into an open vault on a sidewalk in broad daylight. *Fox vs. Booth*, 22 **Pittsburg Journal**, 117. 6. The duty of guarding a trench, lawfully opened across a borough sidewalk, is upon the person who procures the excavation to be made and who has the direction of the work, and not upon the laborer who digs it. *Jessup vs. Sloneker*, 142 Pa., 527. 7. In an action against a borough to recover damages for personal injuries, resulting from the plaintiff stepping into a hole in a cinder walk after nightfall, which excavation had been allowed to remain in a dangerous condition for a month, the case must be submitted to a jury. *Gschwend vs. Millvale*, 159 Pa., 257. 8. One engaged in lawful work, must use such care and caution in conducting it as will reasonably enable others, by the practice of ordinary prudential care, to avoid personal hurt and prevent injury to their property. In the case of excavations in public places, it is the duty of those in charge so to guard and fence them, or at least to give warning notice of their existence, as will keep others using ordinary caution from falling into them. But a person injured thereby is not entitled

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to damages, if the accident was the result of his own carelessness, as clearly proven. *Myers vs. Snyder*, Brightly's Rep., 489.

XVIII. NEGLECT TO PROTECT MANHOLE. If a manhole on a pavement or street was covered by a revolving lid, which, being unsecured, turned when stepped upon, it was a man-trap the very design of which was negligence. A party injured thereby has a right of action. *Glase vs. Phila.*, 169 Pa., 488.

XIX. NEGLECT TO REMOVE OBSTRUCTIONS. In an action against a municipality to recover damages for personal injury sustained for falling over an obstruction in a sidewalk, the case cannot be submitted to a jury, unless there is evidence of unlawful obstruction of the sidewalk, and that this caused the injury, and that the city had notice of this obstruction and was negligent in not removing it. *Davis vs. Corry City*, 154 Pa., 598.

XX. NEGLECT TO REMOVE SNOW AND ICE. 1. Where rain falls and frost follows, and the sidewalks become slippery, municipal corporations are not required to immediately make them safe to walk upon. The law imposes the duty of keeping highways in a safe condition for travelers, but not in such condition as to preclude the possibility of accident or injury. *Allegheny vs. Gilliam*, 30 *Pittsburg Journal*, 460. 2. A municipal corporation is not liable for injuries to a pedestrian caused by a fall upon snow and ice upon the foot pavement of a public street, when the slippery condition of the pavement could have been seen and avoided by the person injured. *Dehnhardt vs. Philadelphia*, 15 W. N., 214. 3. Where a municipality negligently suffers ice and snow to accumulate in ridges on pavements, it is liable for personal injuries received thereby. It is not liable, however, for the ordinary frozen and slippery pavements of the winter season, nor for the non-removal of ice and snow, unless it accumulates as aforesaid. *Dehnhardt vs. Philadelphia*, 16 *Phila.*, 47. 4. A foot passenger on the sidewalk of a city street, who, with full knowledge of a dangerous ridge of ice on the pavement,

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deliberately attempts to walk over it, when he could have avoided it by a slight detour into the street, and who falls and is injured, is guilty of contributory negligence *per se*. He has no claim against the city authorities in such case for not removing such obstruction. In the present case, the ridge of ice had existed on the pavement for three weeks, and this fact was known by the plaintiff. *Erie vs. Magill*, 101 Pa., 616. 5. The plaintiff was injured by a fall while walking on a slippery sidewalk, rendered unsafe by a fall of snow, followed by freezing, and increased by the coasting of children thereon. Held, that the plaintiff was not entitled to recover. It seems, that a municipal corporation is not liable in damages for an accident resulting from the mere slipperiness of sidewalks. *Fry vs. Mercer*, 4 Pa. County, 604. 6. There is no liability on the part of a borough for personal injuries inflicted upon a person, who while walking in broad daylight, slips and falls upon a small ridge of ice on a sidewalk formed by water dripping from an awning. If the alleged ridge of ice was dangerous, the action should have been against the owner of the awning. *Hanson vs. Warren*, 2 Monaghan, 595. 7. In an action against a municipality to recover damages for a fall upon a sloping sidewalk covered with snow packed down and rendered slippery by recent rain, held, that as there was no obvious obstruction of the sidewalk, and no evidence how long it had been in a slippery condition, or that notice thereof, actual or constructive, had been brought home to the municipality, a nonsuit was properly ordered. *Springer vs. Philadelphia*, 22 W. N., 132.

XXI. NEGLECT TO REPAIR. 1. A pedestrian in a town, on a dark night, well acquainted with the unsafe condition of a sidewalk, which had been insecure for a long period of time, is not guilty of contributory negligence in taking it as the most direct way to his home, instead of some other way equally unsafe, if he acted as a prudent man should have done under the circumstances. In the present case, the sidewalks on both sides of the street were in bad repair, there were no lamps, the

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space between the walk and the fence was uneven and cut up by open ditches, and the muddy street was unsafe owing to passing vehicles. *Altoona vs. Lotz*, 114 Pa., 238. *Idem*, 18 W. N., 524. 2. Where there is no structural defect in a sidewalk, a municipal corporation is not liable for an injury occurring by reason of its unsafe condition at the time, unless it had express notice of its defective state, or the same was so notorious as to be evident to all persons passing. It is a fact well known, that the sidewalks, whether of plank or stone, are liable, in the winter, to be thrown out of level by the action of the frost, and in the spring to settle to their former positions. It is not practicable, that for every slight deviation of the walks from their original level, they should be taken up or relaid while the ground is frozen. *Burns vs. Bradford City*, 137 Pa., 361. 3. If a municipal corporation be held liable for damages resulting from the unsafe condition of a sidewalk, it has a remedy over against the person by whose act or conduct the sidewalk was rendered unsafe, unless the corporation itself was a wrong-doer, as between itself and the author of the broken pavement. *Brookville Borough vs. Arthurs*, 25 W. N., 173. 4. If for a consideration, the owner of a lot fronting upon a borough street assumes the obligation of keeping the sidewalk in front of the property in good repair, and through his neglect to do so the borough is compelled to pay damages to a person injured thereon, such owner is liable to the borough for the damages so paid. *Brookville Borough vs. Arthurs*, 130 Pa., 501. *Idem*, 152 Pa., 334. 5. Where a building was leased to several tenants, and a defect existed in the pavement resulting in an injury to a pedestrian, the owner of the building was held responsible. If the defect was in the guarding of the entrance to the area, the owner in the present case would not be liable, as he had not taken possession of it. *Brown vs. Weaver*, 17 W. N., 230. 6. A township is not required either to make or repair footwalks, and is therefore not liable for accidents happening by reason of negligence in the construction or maintenance of such sidewalks. *Chartier's*

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Township vs. Langdon, 114 Pa., 541. *Langdon vs. Township*, 131 Pa., 84. 7. In an action against a city to recover damages for personal injuries caused by a fall on a sidewalk, proof may be given that the lid of a pave-wash was broken, and the bricks around it depressed and sunken for several months. *Crumlich vs. Harrisburg*, 162 Pa., 624. 8. Where a pedestrian was injured by tripping in a hole on a city pavement and sued the owner of the property, the court instructed the jury to find for the defendant, on proof that the premises had been rented by the defendant to another party. *Early vs. Ashworth*, 15 W. N., 142. *Collins vs. Harrison*, 2 W. N., 353. 9. A borough is not obliged to seek defects in a sidewalk, but it must be vigilant to observe them when they become observable to an officer exercising reasonable supervision. *Lohr vs. Philipsburg*, 156 Pa., 246. 10. Where the defects in a sidewalk are not observable to the eye, and it is apparently sound, and has been traversed by numerous citizens without accident, the fact that the plaintiff stumbled upon it and was injured would not render the borough liable. *Lohr vs. Philipsburg*, 165 Pa., 109. 11. In trespass against a borough to recover damages received by the plaintiff in stepping, on a dark night, into a hole in a boardwalk, out of repair for several weeks, the testimony on behalf of the plaintiff showing due care on his part, it was not error to refuse an instruction to find for the defendant. *McCue vs. Knoxville*, 146 Pa., 580. 12. Where the board sidewalk of a public street in a borough has been for a long time in a dangerous condition, of which the borough authorities had notice, the borough is liable for injuries caused to a foot passenger by the footwalk giving way. In such a case, a husband may recover damages for the loss of service of his wife, who was injured. *Nanticoke vs. Warne*, 106 Pa., 373. 13. A person injured by falling into a depression in a sidewalk, cannot recover from the city, unless the city was negligent in allowing the sidewalk to remain in a dangerous condition after notice, express or implied, that it was unsafe for public use. Implied

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notice is presumed, where an obstruction in the highway has existed for a long period. *Philadelphia vs. Smith*, 23 W. N., 242. 14. The liability of a municipality for damages for injuries caused by a defect in a sidewalk is not relieved by the fact that the property owner may also be liable. It is the duty of the city of Philadelphia to see that the sidewalks of its streets are kept in safe condition for travel, and the city is answerable in damages to a pedestrian, who, without negligence, has sustained injuries by reason of a defect in a sidewalk, of which the municipal authorities had notice, either express or implied. *Philadelphia vs. Smith*, 1 **Monaghan**, 147. 36 *Pittsburg Journal*, 419. 15. In an action against a borough to recover damages for injuries received by the plaintiff's wife by falling upon a defective pavement, the plaintiff is entitled to recover for any temporary or permanent loss of earning power of his wife, and the expenses incurred for her medical treatment. Where there was evidence, that there was offset of from nine to fifteen inches in depth in the sidewalk, the question whether this was dangerous should be left to the jury. *Readdy vs. Shamokin Borough*, 137 Pa., 98. 16. In an action against a borough for injuries caused by a fall on a defective sidewalk, the question of the negligence of both parties is for the jury, where the evidence shows that the board walk was upheaved by the roots of trees; and that the plaintiff was not familiar with the broken condition of the boards. *Ringrose vs. Bloomsburg*, 167 Pa., 621. 17. In an action to recover damages for an injury resulting from a fall upon a defective sidewalk, it is not improper for the court to call the jury's attention to the difference between the positive statement of witnesses, who stated that they saw a hole in the sidewalk, and the negative testimony of witnesses that they saw no defect. *Rosevere vs. Osceola Mills*, 169 Pa., 555. 18. In an action for damages for personal injuries received at night by reason of a serious defect in the sidewalk, that the plaintiff attempted to pass over the defect when the night was fair and there were two lighted street lamps near by,

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is evidence of contributory negligence which should be submitted to a jury. *Scranton City vs. Gore*, 124 Pa., 595.

XXII. NEGLECT TO RETAIN IN POSITION. Mere user by the public of a boardwalk constructed by an abutting owner along the side of a township highway, for his own convenience, is in no sense a dedication of it to the public; hence the owner may remove it at his pleasure. *Comm. vs. Barker*, 140 Pa., 189.

Paving.

NEGLECT IN AWARDING CONTRACT. 1. A lien filed by a person not the choice of the property-owners, as required by ordinance, is invalid, and is not cured by a subsequent ordinance ratifying the contract. *City vs. Hays*, 7 W. N., 468. 2. In an ordinance of Philadelphia it is provided that in contracts for paving streets, the contractor must advertise, and the paver be selected by a majority of the property owners. *Keeley vs. Dickinson*, Leg. Gaz. Report, 257.

Payment.

I. NEGLECT BY ENFORCING. Where a person who is threatened with distress, pays an illegal tax under protest, he may maintain an action to recover it. *Tripp vs. School District*, 6 Luzerne Register, 30.

II. NEGLECT IN APPROPRIATING. 1. The rule of the law which appropriates payments made by a debtor in a way most advantageous to the creditor, will not be applied to the prejudice of a surety. *Claflin vs. Swoyer*, 5 Kulp, 107. *Weightman's Appeal*, 10 W. N., 155. 2. The rule concerning appropriations of payments is, that the debtor shall first exercise the right, and then the creditor. If neither makes the appropriation, the law will appropriate first to the satisfaction of the claim which the debtor's interest demands should be first paid. *Davis vs. Wood*, 1 Delaware Co., 382. 3. Payments made by a debtor to his creditor are to be applied in the first instance to the extinguishment of interest then due, and afterwards in reduc-

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tion of the principal. *Howell's Estate*, 13 W. N., 15. 4. One having the means of payment in his hands, must be considered as having made appropriation thereto in the absence of proof to the contrary. *Ingram's Estate*, 32 Pittsburgh Journal, 233: 5. Where a general payment is made without application by either party, and there are divers claims, more or less secured, the court will apply it to those debts for which the security is the most precarious. *Pardee vs. Markle*, 111 Pa., 555. *Cresson's Estate*, 3 Pa. County, 419. 4 Lancaster Review, 217. *Hildreth vs. Davis*, 6 Kulp, 336. 6. The creditor, in the absence of an appropriation by the debtor, had the right to appropriate it to the payment of the larger of two notes. *Richmond vs. Lee*, 8 Luzerne Register, 181. 7. The general rule of law as to the application of payments is well settled. It is this: When one indebted to another on several accounts, makes a payment, he may direct on which it shall be applied. If he omits to do so, the creditor may apply the payment as he sees proper. When no specific application has been made by either debtor or creditor, the law will apply it in the way most beneficial to the creditor, or in discharge of the earliest liabilities of a running account. The creditor may reserve his election until he is called upon to report his action. *Wagner's Appeal*, 103 Pa., 187. *Trexler vs. Schmeyer*, 4 Northampton Co., 182. *Brown vs. Coray*, 3 Kulp, 377. 14 Luzerne Register, 301. *Penna. Co.'s Appeal*, 18 W. N., 469.

III. NEGLECT IN MAKING. 1. To recover money paid to the city, it must be shown that it was involuntarily paid under protest as an unauthorized exaction. *Boswell vs. Phila.*, 32 Pittsburgh Journal, 153. 2. Money voluntarily paid cannot be recovered, even where the payment is made upon a demand which is unjust. To this rule, however, there are certain exceptions. A party may recover money obtained from him by duress, extortion, imposition, or taking any undue advantage of his situation. *Coon vs. Canal Co.*, 14 Luzerne Register, 461. 3 Kulp, 488. *Glendon vs. Luzerne Co.*, 4 Kulp, 249. 3. A payment made under an urgent necessity, as for the pur-

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pose of preserving one's person or goods, may be recovered in an action for money had and received. *Dawson vs. Ins. Co.*, 6 Pa. County, 214. 4. Money voluntarily paid cannot be recovered back simply because the payment was made under protest. The coercion which will render a payment under protest involuntary, must consist of duress either of the person or the goods. A mere denial of an incorporeal right, by which a man is compelled to choose between conflicting views of the law, is not sufficient for that purpose. The threat of a distress for rent is not such duress, because the party may replevy the goods distrained, and try the question of liability at law. The threat of legal process is not such duress, for the party may plead and make proof, and show that he is not liable. If the demand is illegal, and the party can save himself and his property in no other way, he may pay under protest and receive it back. *De la Cuesta vs. Ins. Co.*, 136 Pa., 63. 5. Payment to the wrong person without authority, cannot operate as a discharge of a debt. *Fidelity Co. vs. Norris*, 17 Phila., 258. *Travelers' Ins. Co. vs. Heath*, 12 Lancaster Bar, 173. 6. Where a payment is made voluntarily, or on unfounded demand, or in ignorance of the law or legal circumstances of the case, it cannot be recovered. *Finnel vs. Brew*, 81 Pa., 362. *Real Estate Institution vs. Linder*, 74 Pa., 371. *Union Bank vs. Denham*, 15 W. N., 541. 7. The payment under protest by the owner of an article to one who agreed to repair it for a certain price, but who demanded more, is not a voluntary payment, and may be recovered. *Grammes vs. Erney*, 7 Lancaster Review, 85. 2 Northampton Co., 48. 8. Where reclamation is ordered of moneys which have been paid by mistake of both parties, interest is due only from the date at which the demand for restitution was made. *Grimes Estate*, 147 Pa., 190. 9. A voluntary payment of money under a claim of right, cannot in general be recovered back. There must be compulsion, actual, present and potential, in inducing the payment by force of process available for instant seizure of person or

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property, and the payment have been made under protest. *Harvey vs. Bank*, 119 Pa., 222. *Union Ins. Co. vs. Allegheny*, 101 Pa., 250. *Peebles vs. Pittsburg, Idem*, 304. 10. Equity will not on the mere ground of silence, relieve one who is acquainted with his rights, or who has the means of becoming so, and yet wilfully expends money on the lands of another without obtaining his assent. His ignorance is wilful, and he acts at his peril. *Carr vs. Wallace*, 7 W., 401. *Kersey Oil Co. vs. R. R.*, 5 W. N., 144. 11. Where there is no mistake or fraud, a voluntary payment cannot be recovered on the mere ground that the one party was under no obligation to pay, and the other had no right to receive. *McCrickart vs. Pittsburg*, 88 Pa., 133. 12. Money paid voluntarily by an agent acting within the scope of his agency on behalf of his principal, to a creditor claiming it as being due from the principal, cannot be recovered back in an action. *Mattes vs. Jamison*, 1 Northampton Co., 281. 13. Where money is paid under a mistake of facts, the person making it, is entitled to recover it back, unless the rights of others are prejudiced by the mistake. *Meredith vs. Haines*, 2 Chester Co., 124, 199. 14. Money paid under a *bona fide* forgetfulness of facts which disentitle the defendant to receive it, may be recovered. Even if the party paying money under a mistake of fact, had the means of knowledge of fact, he can recover it unless he paid it intentionally, not choosing to investigate the facts. *Meredith vs. Haines*, 14 W. N., 364. 15. Money obtained by duress, extortion, imposition or otherwise involuntarily paid, may be the object of suit in order to recover it. The constraint that takes away free agency and destroys the power of withholding consent to a contract, must be one that is imminent and without immediate means of protection, and such as would operate on a mind of reasonable firmness. *Motz vs. Mitchell*, 91 Pa., 117. 16. The coercion or duress which will make a payment involuntary, must, in general, consist of some actual or threatened exercise of power, from which the person making payment has no other immediate relief. *Murphy vs. Cawley*,

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7 Kulp, 128. 17. Voluntary payments of taxes made without duress or protest cannot be recovered, even where there is a mistake in the estimate of the amount of land taxed. *Patterson vs. Phila.*, 19 Phila., 303. 18. An illegal assessment for street improvements, paid under protest, cannot be recovered in the absence of actual or threatened seizure of property. The mere fact of protest, at the time of payment, does not render such payment involuntary. *Peebles vs. Pittsburg*, 29 Pittsburg Journal, 360. 19. Money paid without protest upon a wrongful demand cannot be recovered in an action, and even when paid under protest; there must generally be some species of duress by the wrongful detention of either person or property, by means of which money has been extorted without a just claim, and the person yields from some reasonable fear of some immediate injury or loss. Otherwise, it will be deemed a voluntary payment and cannot be recovered. *Tyson vs. Church*, 2 Montgomery Co., 58. 20. If one man, by mistake, and without any obligation, pays the debt of another, he shall recover it back, unless the party recovering the money was injured by the mistake. *Tybout vs. Thompson*, 2 Browne, 27. 21. Money voluntary paid and received under a claim of right, if received with good conscience and no deceit or unfair dealing was used in obtaining it, cannot be recovered back. *Ward vs. McCue*, 31 Pittsburg Journal, 160.

IV. NEGLECT TO DEMAND. 1. After a lapse of twenty years from maturity, a bond is legally presumed to be paid; the presumption is of fact, not a legal bar, and casts upon the party alleging the debt the burden of countervailing proof; the same rule prevails in judgments, mortgages, and indeed in every species of security for the payment of money. *Van Loon vs. Smith*, 103 Pa., 241. *Clapier vs. Mansing*, 2 Miles, 139. 2. Presumption of payment arises after twenty years, and cannot be rebutted but by clear evidence. A shorter period, aided by circumstances tending to strengthen that presumption, may furnish sufficient grounds for inferring the fact of pay-

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ment. *Peters' Appeal*, 106 Pa., 340. *Hess vs. Frankenfield*, *Idem*, 444. 3. Where lapse of time is depended on to raise a presumption of payment, nothing short of twenty years will answer. *Rogers vs. Burns*, 4 *Pittsburg Journal*, 820.

V. NEGLECT TO MAKE. 1. An attorney in fact, who collects money for his principal, is bound to pay it over at once; his neglect to do so gives a right of action, for which *assumpsit* will lie. *Campbell vs. Boggs*, 3 *Pittsburg Journal*, 100. 2. A statement of claim averring the employment of defendant by plaintiff to pay off a mortgage debt; that defendant had in his hands sufficient funds of plaintiff's for the purpose, but wrongfully neglected to pay the debt, and the damage to plaintiffs therefrom, contains all the essential elements of a declaration for negligence. *Shaffer vs. Corson*, 141 Pa., 256.

VI. NEGLECT TO RECOVER BACK. 1. In all cases where money is collected or paid upon lawful process of execution, it cannot be recovered back, though not justly due by the defendant to the plaintiff. *Federal Ins. Co., vs. Robinson*, 24 *Pittsburg Journal*, 39. 2. Money voluntarily paid upon a claim of right cannot be recovered back, however unfounded such claim may afterwards turn out to be. *Gould vs. McFall*, 35 *Pittsburg Journal*, 344. 3. A voluntary payment of money under a claim of right without fraud and with full knowledge of all the facts, cannot, in general, be recovered. To warrant such a recovery, there must be compulsion, actual, present, potential, and the demand must be illegal. A mere protest will not confer a right of recovery. A threat of legal process is not compulsion. *Hazleton vs. McGroarty*, 2 Pa. Dist., 288.

Pensions.

NEGLECT IN ATTACHING. Pension money, received from the government, and deposited in a bank, is not subject to attachment execution. The act of congress declares that the pension shall enure wholly to the benefit of the pensioner. *Moore vs. Marsh*, 16 W. N., 239. *Holmes vs. Tullock*, 125 Pa., 135.

Penalties.

NEGLECT IN RECORD OF A JUSTICE. In an action of debt for a penalty, the magistrate should state on his record what is alleged against the defendant, as to his acts, or omission of anything to be done, which exposes him to the penalty. The substance of the ordinance alleged to have been violated should always be stated on the record, in an action brought for a penalty. *Manayunk vs. Davis*, 2 Parsons, 294.

Perjury.

I. NEGLECT IN INDICTMENT. In an indictment for perjury, it is not necessary to aver that the suit, or other judicial proceeding, in which the false oath is alleged to have been taken, has been finally determined, or that final judgment has been entered therein. *Comm. vs. Moore*, 20 Phila., 390.

II. NEGLECT IN INSTITUTING ACTION. 1. A prosecution for perjury alleged to have been committed in an affidavit of defence in a civil action, cannot be instituted until after final judgment therein. *Comm. vs. Dickinson*, 3 Clark, 265. 2. A party charged with having committed perjury in a civil action, cannot be arrested until after the determination of such civil suit. But a bill of indictment for perjury may be submitted to the grand jury pending such suit, to prevent the bar of the statute of limitations. *Comm. vs. Heintzer*, 13 W. N., 129.

III. NEGLECT IN PROSECUTION. To sustain a prosecution for perjury, it must appear that the oath was false, the intention wilful, the proceedings judicial, the party lawfully sworn, the assertion absolute and material to the matter in question. *Comm. vs. Kuntz*, 2 Clark, 375.

Pews.

NEGLECT TO PAY RENT. Pewholders in a church are liable for increased *pro rata* assessments laid by the trustees, on the value of the pews, to raise the necessary means of defraying expenses, notwithstanding in the original deeds for the pews, a specified lower rate per cent. was reserved. Property in a pew is a mere easement. *Curry vs. Trustees*, 2 Pittsburg, 40.

Physician.

I. NEGLECT BY MALPRACTICE. 1. In this case, a physician was charged with negligence and want of skill in attending to a broken leg, which resulted in necessary amputation of the limb. It was held, that in an action against the physician for *mala praxis*, it is not competent for the plaintiff to give evidence that the defendant abandoned the patient and refused to attend him, unless such allegations appear in the declaration. *Bemus vs. Howard*, 3 W., 255. 2. In instructing a jury in the case, of alleged malpractice, the judge should not express sympathy for either party. Such expressions are inappropriate and hazardous. *Byles vs. Hazlett*, 29 **Pittsburg Journal**, 276. 11 W. N., 212. 3. The general rule is that one injured should do all he reasonably can to lessen the injury, but in an action against a physician for malpractice, the defendant cannot complain of the plaintiff's refusing to do what another physician prescribed, although it would have lessened the injury. In such a case, the patient is not called upon to experiment upon himself. *Chamberlain vs. Morgan*, 2 **Lancaster Bar**, No. 47. 4. A physician who was arrested on a *capias* on a judgment for damages for the negligent use of an electric battery on a patient, may be discharged under the insolvent law without undergoing sixty days' imprisonment. *Drumm vs. McTaggart*, 3 Pa. Dist., 367. 11 **Lancaster Review**, 102. 5. On a trial against a surgeon for malpractice, it is proper to allow the plaintiff to exhibit the injured limb to the jury. A physician is not chargeable for ignorance of a case if he prescribes for it rightly. *Fowler vs. Sergeant*, 1 **Grant**, 355. 6. A physician or surgeon is under obligation to possess, and it is his duty in the treatment of a case to employ, such reasonable skill and diligence as is ordinarily exercised in the profession, regard being had to the present advanced stage of the medical profession. It is the duty of the patient to conform to the necessary prescription. (The charge in the present case was for malpractice in the setting and treatment of a broken leg.) *McCandless vs. McWha*, 22 **Pa.**, 261.

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II. NEGLECT IN ADMINISTERING MEDICINE. Evidence is admissible, that the same kind of medicine which resulted in the death of the party taking it, had a few days prior thereto been administered by the defendant, a physician, to another whose death was thereby occasioned. *Goersen vs. Comm.*, 99 Pa., 388.

III. NEGLECT IN BOOK ENTRIES. The book entries of a physician, if made at the proper time and itemized minutely, may be properly received as evidence; but when they consist principally of hieroglyphics and signs, unintelligible without a glossary, they should be rejected. *German's Estate*, 16 Phila., 318. *Birch vs. Gregory*, 7 W. N., 147. *Matthews vs. Glenn*, *Idem*, 213.

IV. NEGLECT IN DIAGNOSING DISEASE. The city of Philadelphia is not responsible for injuries caused by the negligence or mistake of physicians employed in the municipal hospital, who mistook a case of measles for one of small-pox. *Hand vs. Philadelphia*, 20 Phila., 285.

V. NEGLECT IN GIVING CERTIFICATE. In trespass against physicians in giving a false certificate for the commission of the plaintiff to a hospital for the insane, under the act of April 20, 1869, no presumption of negligence necessarily arose from the mere fact that the defendants were mistaken as to the fact of insanity. In the present case, they had made an examination of the plaintiff, and had committed an error of judgment, to which the most careful and skillful physician is liable in a mysterious disease like insanity. *Williams vs. Le Bar*, 141 Pa., 149.

VI. NEGLECT IN REGISTRATION. Where a graduate of a foreign medical college presents his diploma, he cannot be registered here, unless such diploma be endorsed by the faculty of a medical college of this state, represented by their dean. *Bauer's Appeal*, 17 W. N., 394. 1 Lancaster Review, 281. *Comm. vs. Irving*, Susquehanna Chronicle, 69.

VII. NEGLECT IN RESUMING PRACTICE. 1. A physician agreed not to locate within seven miles of a certain village.

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Held, that although he could not locate within that radius, yet he might practice anywhere. *Miller vs. Keeler*, 2 Northampton Co., 285, 287. 2. Where one physician gave to another a bond in a specified sum, conditioned that the obligor would not practice medicine within fifteen miles of a specified place, held, that on the face of the bond the sum was a penalty, and not liquidated damages. *Bigony vs. Tyson*, 75 Pa., 157.

VIII. NEGLIGENCE IN SETTING A DISLOCATED ARM. In an action against a physician for malpractice to an injured arm, he could not prove by a consulting physician that the subsequent refusal of the patient to be placed under the influence of an anæsthetic prevented an attempt to reduce the dislocation. *Chamberlin vs. Morgan*, 68 Pa., 168.

IX. NEGLIGENCE IN SIGNING CERTIFICATE. A physician who has merely signed a false certificate of lunacy, and has done nothing more towards causing the confinement of the alleged lunatic, is not liable in trespass for an arrest made under the certificate. Negligence will not be presumed from the mere fact that the certificate of insanity is false. *Williams vs. Le Bar*, 2 Northampton Co., 297.

X. NEGLIGENCE IN THE TERMS OF EMPLOYMENT. Where a firm sent a servant to request a physician to visit a boy who had been injured in their service, and directed him to tell the plaintiff that they would pay for the first visit, which fact the servant omitted to mention, but employed the physician generally, held, that the firm was liable for the entire bill of the doctor who attended the boy until he recovered. *Mundorff vs. Wickersham*, 63 Pa., 89.

XI. NEGLIGENCE IN THE TREATMENT OF FRACTURES. 1. In an action for alleged malpractice, it is competent for the plaintiff to ask an expert a hypothetical question based on the actual facts, and then to inquire whether the facts indicate such care on the part of the surgeon in charge as the case demanded. *Olmsted vs. Gere*, 100 Pa., 127. 2. Doctors are not required to insure the recovery of their patients, but only to treat them with adequate care and skill. The character of the treatment

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administered should be explained to the jury. Was it such as was usually given by physicians of competent skill and care? Or was it unskillful, inadequate and negligent? If the injured party refused or neglected to carry out the instructions of the physician, he would be guilty of contributory negligence in doing or omitting to do acts injurious or beneficial. *Reber vs. Herring*, 115 Pa., 597.

XII. NEGLIGENCE IN USING CHLOROFORM. A physician using chloroform as an anæsthetic agent, is only bound to look at natural and probable effects. He is not answerable for alleged negligence on results arising from the peculiar condition or temperament of the patient, of which he had no knowledge. To make him answerable, two things must appear: first, that he was guilty of negligence or want of skill in administering the chloroform, and, second, that the disease which followed was the result of the use of the remedy. If a physician resorts to the acknowledged proper sources of information, he has done his duty, and should not be made answerable for the evils that may result from errors in the instruction which he has received. *Bogle vs. Winslow*, 5 Phila., 136.

XIII. NEGLIGENCE OF SKILL. 1. Doctors are not required to insure the recovery of their patients, but only to treat them with adequate care and skill. As to the treatment administered, the question is, was it such as is usually given by physicians of competent skill and care. If the patient disregards the instructions of the physician, he is guilty of contributory negligence. *Reber vs. Herring*, 19 W. N., 293. 2. When a physician or surgeon takes the charge of a patient, he assumes an implied obligation to treat the case with reasonable diligence, carefulness and skill. It is, however, the duty of the patient to submit to the treatment prescribed, and to follow the directions given, provided they be such as a physician of ordinary skill would adopt or sanction. The measure of skill he is bound to exercise does not depend on whether or not he refused the proffered assistance of other medical men. If the contributory negligence of the patient united in producing

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the injuries complained of, the physician is not liable in damages therefor. *Potter vs. Warner*, 91 Pa., 362. 3. A physician cannot recover a claim for professional services, unless he possesses the requisite skill. *Langolf vs. Pfromer*, 2 Phila., 17. 4. The implied contract of a surgeon or physician who attends a patient, is not that he certainly will effect a cure, but that he will use all known and reasonable means to accomplish that object, and that he will attend his patient carefully and diligently. He must display the same skill and diligence as are ordinarily exercised in his profession by thoroughly educated practitioners. No presumption against him arises from the mere fact the patient does not recover. The burden of proving want of skill lies upon him who alleges it. *Haire vs. Reese*, 7 Phila., 138. *Tiedemann vs. Lowengrund*, 2 W. N., 270.

XIV. NEGLECT TO DISCONTINUE PRACTICE. 1. A contract made by a physician with another physician purchasing his practice, not to practice his profession within a radius of five miles from a certain place, will be specially enforced by injunction. *Betts' Appeal*, 10 W. N., 411. 2. A physician, who has made an agreement not to practice medicine within a given radius, will be restrained from answering "special calls" made for his services by parties within the prohibited district. *Gaul vs. Hoffman*, 5 Pa. County, 353. 3. In a contract restraining a physician from locating within a prescribed distance from a certain village, the rule is to measure the distance in a straight line. *Miller vs. Keeler*, 9 Pa. County, 274. 4. Before a covenant "not to practice medicine in the neighborhood" can be enforced in equity, evidence must be given to show the extent of the practice sold to the plaintiff. *McNutt vs. McEwen*, 10 Phila., 112. *Paxson's Appeal*, 15 W. N., 509. 5. The courts will enforce the contract of a physician, made on selling out his practice, not to practice his profession within a certain radius. *Paxson's Appeal*, 106 Pa., 429. 6. Where a physician disposes of his practice to another physician and subsequently resumes his practice in the same locality,

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the purchaser is entitled to an injunction for the specific performance of the contract. *Wilkinson vs. Colley*, 164 Pa., 36.

XV. NEGLECT TO EMPLOY. 1. A person being stricken suddenly with a disease of the brain which terminated fatally, a physician was called in by his business partner. Held, that under these circumstances the physician was entitled to recover for his professional services, although they were not directly authorized by the decedent. *Sherman's Estate*, 23 W. N., 30. 2. A person injured by the negligent conduct of another, is not unqualifiedly bound to engage medical aid and attendance for such length of time as his injuries make necessary. *Vallo vs. Express Co.*, 147 Pa., 404.

XVI. NEGLECT TO PAY. 1. Where a physician and surgeon renders professional services in a case of emergency, on the credit of his patient, who fails to pay the bill, and after several years admits himself to be a pauper, the physician cannot then recover for said services from the overseers of the poor. *Blakeslee vs. Directors*, 102 Pa., 274. 2. In the absence of a special contract, a person placing himself under the care of an eminent medical practitioner, will be required to pay the compensation ordinarily received by such persons under similar circumstances. *Cuthbert's Estate*, 17 Phila., 521. 3. Where the services of a physician were rendered for a period of six months, and ceased two months prior to decedent's death from a continuing disease, the physician's claim is preferred. *Dawson's Estate*, 4 Lancaster Review, 343. 4. The right of seamen to be cured of sickness or any injury received in the ship's service at the expense of the ship, is a rule regarded in the maritime law as forming part of the contract. The seaman is not obliged to accept the tender of hospital service, but may receive medicine and medical attendance at the cost of the vessel. *Holt vs. Cummings*, 102 Pa., 212. 5. A county is not liable for the services of a physician employed by the district attorney to make a *post-mortem* examination in a case of violent death. The coroner can bind the county for such services. *Hopkins vs. Chester Co.*, 1 Chester Co., 481.

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XVII. NEGLECT TO PAY LICENSE FEE. A physician, opening a transient office in one of the counties of the state, is not required to pay the license fee imposed by the act of March 24, 1877; that provision having been repealed by the act of June 8, 1881. *Peebles vs. Wayne Co.*, 10 Pa. County, 69.

XVIII. NEGLECT TO PERMIT EXAMINATIONS BY. 1. In actions for personal injuries, the court, upon proper cause shown, may order before trial a medical examination of the plaintiff. *Demenstein vs. Richardson*, 2 Pa. Dist., 825. 2. In an action brought to recover injuries done through defendant's alleged negligence, the plaintiff on refusing to submit to the examination of any other physician than his own, may be ordered by the court to finish a bill of particulars of his injuries. *Harvey vs. Traction Co.*, 26 W. N., 231. 3. Where plaintiff claims damages by reason of alleged spinal injury received through the negligence of defendant, such injury being latent in its nature, the court will, on application of the defendant, order plaintiff to submit to examination by inspection by medical experts produced on the part of defendant. *Hess vs. R. R.*, 7 Pa. County, 565.

XIX. NEGLECT TO PREFER CLAIM. Where death results from lingering illness, the medical attendant is not entitled to a preference during all the sickness. The term "last illness" in the act of February 24, 1834, appears to include only the services of the physician after the patient is virtually prostrated and the services constantly necessary. *Duckett's Estate*, 1 Schuylkill Record, 342. 1 Kulp, 227. 1 Chester Co., 78. 9 Luzerne Register, 271. *Contra, Jones' Estate*, 2 Chester Co., 302.

XX. NEGLECT TO REGISTER. 1. The act of assembly of June 8, 1881, providing for the registration of physicians, is a constitutional and valid statute. *Comm. vs. Taylor*, 12 Luzerne Register, 182. 2 Kulp, 364. 2. A physician residing and practicing in one county in which he is registered, but having an office in another county where he is not registered, is a "sojourner" therein within the meaning of the act of June 8,

Physician—Continued.

1881, and is, therefore, guilty of a violation of said act. He should register in both counties. *Ege vs. Comm.*, 20 W. N., 73. 1 Pa. County, 483. 3 Lancaster Review, 111. 3. In respect to physicians coming from other states or countries, claiming to be qualified to practice, and having a diploma from a college outside the state, the statute makes special provision. It constitutes the faculties of the several medical colleges, tribunals to examine the diplomas and decide as to the qualifications of the applicant. The applicant should then have the prothonotary register him, which cannot be done without such medical endorsement on the diploma. *Physician, In re*, 16 W. N., 538. *Comm. vs. Irvin*, Susquehanna Chronicle, 69.

XXI. NEGLECT TO TESTIFY. A physician is a going witness, and a party desiring his testimony should take his deposition. *Vanriper vs. Vanriper*, 3 Lancaster Review, 155.

Pilots.

I. NEGLECT IN SELECTING ROUTE. A custom among pilots to take a dangerous route, when there is no necessity for it, is bad, and ought to be abandoned. *Baker vs. The Hibernia*, 5 Clark, 46.

II. NEGLECT IN STEERING. Where, under the pilotage laws, the employment of a pilot is necessary for a ship in leaving a wharf in Philadelphia, and through his negligence a collision takes place with another vessel, the owner of the ship is not liable. *Smith vs. The Creole*, 5 Clark, 186.

III. NEGLECT OF DUTY. The board of port wardens of Philadelphia has authority over pilots whom it has licensed. *Viriden's Appeal*, 6 W. N., 560.

IV. NEGLECT TO ACCEPT. Under the act of March 24, 1803, it is the duty of the master of a vessel to accept the services of the first pilot who offers his services. *Lord Clive, In re*, 11 W. N., 256.

V. NEGLECT TO EMPLOY. 1. Where the court is fully satisfied that a ship has refused or neglected to receive a pilot, the pilot so discarded is entitled to his fee. *Chambers vs. The*

Pilots—Continued.

Talisman, 18 Phila., 556. 2. The laws of Delaware and Pennsylvania command the employment of a pilot in the case of every vessel arriving from or bound to any foreign port or place. *Comm. vs. Fitzpatrick*, 35 W. N., 258.

Platform.

NEGLECT TO PROTECT. Where the plaintiff, while on his way to the third story of a building, having a safe entrance by a well-lighted hall and stairway, stepped aside through a door on the second floor, out into the dark, upon a platform, which he thought was protected by a railing, but fell and was injured, held that he was guilty of contributory negligence. *Johnson vs. Wilcox*, 135 Pa., 217.

Pleading.

I. NEGLECT TO REMEDY DEFECTS IN. Many small faults in pleading are cured by verdict. The court is always strongly inclined to support judgments, after the merits have been tried. The rule of law is, that where the declaration contains a substantial cause of action, it shall be aided, though defective in form. *Miles vs. Oldfield*, 4 Y., 423. *Comm. vs. Smith*, 2 S. & R., 304. *Carl vs. Comm.*, 9 S. & R., 63.

II. NEGLECT IN DATE IN DECLARATION. In a suit in court on an appeal from a justice, if the declaration lay the assumption after the commencement of the suit, it is error, and the supreme court will not send the record back to be amended below. *Langer vs. Parish*, 8 S. & R., 134. *Roud vs. Griffith*, 11 S. & R., 130.

III. NEGLECT IN FORM OR SUBSTANCE. Where there is any defect, imperfection, or omission in any pleading, which would have been a fatal objection upon demurrer, yet if the issue be joined as required, and at the trial proof of the facts so defectively stated or omitted, such defect or omission is cured by the verdict. *Quick vs. Miller*, 14 W. N., 1.

IV. NEGLECT IN PLEA. The plea of *non est factum* is a nullity in an action of debt on simple contract. The plea of

Pleading—Continued.

payments admits the cause of action as stated in the declaration, and throws the affirmative of the issue on the defendant. *Gebhart vs. Francis*, 32 Pa., 78.

V. NEGLECT IN THE DECLARATION. 1. Counts in debt and covenant cannot be joined. Such a declaration is bad on general demurrer. *Brumbaugh vs. Keith*, 31 Pa., 327. 2. The parties on an appeal from a justice may go to trial without pleadings; and if they try the case on a declaration in which important averments are left blank, the court will treat the case as having been tried without a declaration. *Cunningham vs. McCue*, 31 Pa., 469. 3. If the plaintiff omit in his declaration to aver a fact essential to his recovery, and the defendant demur, the plaintiff cannot introduce into his joinder in demurrer an averment of such fact. He should ask leave to amend his declaration. *Gibson vs. Todd*, 1 R., 452. *Diehl vs. McGlue*, 2 R., 337. 4. A court of error will take no notice of a discrepancy between the writ and the declaration after a verdict on the merits. *Gilbert vs. Henck*, 30 Pa., 205. 5. If a general verdict be given on several counts, some of which are for demands not within the jurisdiction of the court, it is bad for the whole. *Kline vs. Wood*, 9 S. & R., 294. 6. Where a fatal defect appears on the face of the declaration, a court of error is bound to notice it. *Maher vs. Ashmead*, 30 Pa., 344. 7. A count in *assumpsit* cannot be joined with a count in tort, and upon the trial the plaintiff may be compelled to elect upon which he will proceed. *Noble vs. Laley*, 50 Pa., 281.

VI. NEGLECT TO DEMUR. Where there is any defect or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as required on the trial proof of the fact so defectively stated or omitted, and without which probably the judge would not have directed or the jury given the verdict, such defect or omission is cured by the verdict by the common law. *Quick vs. Miller*, 103 Pa., 67.

VII. NEGLECT TO FILE DECLARATION. 1. By rule of

Pleading—Continued.

court, the prothonotary is directed to enter a *non pros*, as a matter of course, unless a declaration be filed within twelve months from the first day of the term to which the original process is returnable. *McCall vs. Crousillat*, 2 S. & R., 167.

2. A court on error will not reverse a judgment entered in the common pleas, because the record does not show that a declaration or rule to plead was filed. *Melchior vs. Ralston*, 2 Y., 154.

VIII. NEGLECT TO FILE PLEA. 1. Where a rule has been entered on a defendant to plead within a given time, or judgment, a plaintiff cannot obtain a judgment for want of a plea, after the defendant has actually filed one, although not within the time specified in plaintiff's rule. *Case vs. Cushman*, 1 Pa., 243. 2. The court may at any time, to prevent injustice, or for special reasons, permit a plea to be entered *nunc pro tunc*, and a plea *puis darrein continuance*, although a continuance has intervened. *Lyon vs. Marclay*, 1 W., 271.

IX. NEGLECT TO INSERT NAMES. An omission to strike out the name of the casual ejector, and to insert that of the real defendant may be amended after judgment, and if the real defendant proceeds to trial, the judgment is conclusive against him. *Bailey vs. Fairplay*, 6 B., 450. *Irish vs. Scovil*, *Idem*, 55.

X. NEGLECT TO PERFECT. An omission to protest the pleadings, is a tacit agreement to waive matters of form and try the cause on its merits. *Burke vs. St. Patrick's Society*, 2 Schuylkill Record, 15. *Collum vs. Andrews*, 6 W., 516. *Witmer vs. Schlatter*, 15 S. & R., 150.

XI. NEGLECT TO PLEAD IN ABATEMENT. It is exceedingly to be regretted that exceptions which might be taken in abatement, and often cured in a moment, should be reserved to the last stage of the suit, to destroy its fruits. *Turner vs. Bank*, 4 D., 10. *Riddle vs. Stevens*, 2 S. & R., 537.

XII. NEGLECT TO PLEAD IN TIME. In computing the time to plead on ten days' notice under a rule of court, the day on which the notice is given must be excluded, and if the final day falls on Sunday, it also is to be excluded. *Markes vs Russell*, 40 Pa., 372.

Pleas. See "PLEADINGS."

I. NEGLECT IN FILING. A plea in abatement will not ordinarily be received after a plea in bar, but where the latter plea has been entered by mistake, and the defendant has not been in default, and applies at once, it is in the discretion of the court to permit him to withdraw it and to plead in abatement. *Harrison vs. Tillinghast*, 3 Kulp, 270.

II. NEGLECT TO FILE. 1. After a case has been partially tried, it is too late for a defendant to amend his pleadings by substituting or adding a plea in abatement. *Utz vs. Raish*, 4 Kulp, 375. *Ins. Co. vs. Michener*, 4 W. N., 462. 2. It is too late to file a plea in abatement during the trial of a cause, but if the plaintiff is not injured thereby, the supreme court will not reverse for that error. *Murphy vs. Chase*, 103 Pa., 260.

Pledge.

I. NEGLECT OF PLEDGEE. 1. If the pawnee does not choose to exercise his right to sell, he still retains the property as a pledge, and upon tender of the debt he may, at any time, be compelled to restore it. *Humphrey vs. Bank*, 113 Pa., 422. 2. Where stocks are pledged as collateral security for a loan for an indefinite time, the pledgee, after an unavailing call upon the debtor to redeem, should sell at public sale after due notice given. A sale at private sale without notice, is an illegal mode of dealing with the collateral held in trust. *Sitgreaves vs. Bank*, 49 Pa., 359. *Diller vs. Brubaker*, 52 Pa., 502. 3. As a general rule, a pledgee must take possession of the thing pledged in order to acquire a valid title as against the creditors of the pledgor. An exception is the case of the pledge by a partner of his interest in his partnership. *Wallace's Appeal*, 104 Pa., 559. 4. A pawnee may use the pawn, provided it be not the worse for it; but he is answerable for damage occasioned by so using it. Though he use it tortiously, he is answerable by action only. *Thompson vs. Patrick*, 4 W., 414.

II. NEGLECT OF PLEDGOR. A pledgor, by the act of pledging, impliedly engages that he is the owner of the property pledged; and where the ownership of any part of it is

Pledge—Continued.

not in him, he is liable to the pledgee in damages, if by reason of defective title it is taken from him. *Mairs vs. Taylor*, 40 Pa., 446.

III. NEGLECT OF THE BAILEE OF A PLEDGE. The bailee of a pledge or pawn must give notice to the pledgor of an intent to sell, after default of payment, and also of the time and place of sale, in the absence of a contract to sell *ex mero motu*. *Davis vs. Funk*, 39 Pa., 243.

IV. NEGLECT TO REDEEM. 1. An execution cannot take goods out of a pawnee's possession without tendering him the money for which he holds them in pledge. *Baugh vs. Kirkpatrick*, 54 Pa., 84. 2. A pledge for a loan of money to be repaid at a fixed time, may be sold by the pledgee after the time for redemption has gone by, and a demand for repayment duly made; provided reasonable notice be given to the pledgee of the time and place of the intended sale. *Richards vs. Davis*, 5 Clark, 471.

Policeman.

NEGLECT OF DUTY. 1. Borough authorities are not liable for the neglect of duty on the part of policemen. *Brumbaugh vs. Bedford*, 40 Pittsburg Journal, 462. 2. Police officers are personally liable for their malfeasance or nonfeasance in office, but for neither is the corporation responsible. The corporation appoints them to office, but does not in that act sanction their official delinquencies, or render itself liable for their official misconduct. *Freeman vs. Philadelphia*, 7 W. N., 45. 3. A municipality is not liable for an injury resulting from the neglect or misconduct of a policeman. The conservation of the peace is not a part of its duty; that belongs to public officers. *Norristown vs. Fitzpatrick*, 1 Chester Co., 10. 4. The power to appoint police officers may or may not be exercised by municipalities, but the powers of such officers are derived not from municipal ordinances, but from the common law and acts of assembly. Hence, the city is not answerable for the negligent act of a police officer. In no sense, can such

Policeman—Continued.

officers be regarded as servants or agents of the city. Their duties are of a public nature. *Norristown vs. Fitzpatrick*, 94 Pa., 124. 8 W. N., 459. *Elliott vs. City*, 75 Pa., 347.

Poor.

I. NEGLECT IN SETTLEMENT. 1. A wife, deserted by her husband, may gain a settlement for herself by leasing real estate of the annual value of ten dollars, dwelling upon the same for a year and paying the rent. *Ayers' Case*, 4 Pa. County, 499. 2. A pauper having a settlement in one district, retains it until he acquires a new settlement. *Braintrim vs. Windham Overseers*, 10 Pa. County, 250. 3. The settlement of a pauper may be gained by residing in a poor district in one or more tenements, and paying at least ten dollars rent. *Denison District vs. Pittston*, 10 Luzerne Register, 110. *Montoursville Overseers vs. Fairfield*, 112 Pa., 99. 4. A settlement is gained by an unmarried person, by reason of hiring and service for one year. The consideration need not be paid in money. *Fayette Overseers vs. Fcrmenagh*, 11 Pa. County, 70. 5. If a foreigner comes here and becomes a charge, the poor district in which he first becomes a charge is liable for his support. *Grim vs. Haycock*, 1 Pa. Dist., 815. 6. A pauper who is charged in one district cannot, while this relationship continues, acquire a settlement in another district. *Lock Haven vs. Chapman*, 22 W. N., 114. *Lewisburg Overseers vs. Milton*, 18 W. N., 141. 7. A child is chargeable to the poor district where it is born, if the parents are foreigners, and have died or abandoned it, leaving it in destitute circumstances. *Milton vs. Northumberland*, 1 Pa. County, 377. 8. A wife who has separated from her husband because of his intemperate habits and failure to support her, may gain a settlement, under the poor laws of the state, in a district different from that of her husband. *Parker City Overseers vs. DuBois*, 20 W. N., 81. 9. The settlement of a husband in a poor district is the settlement of his wife and children. Where his children are illegitimate, his settlement is not theirs. *Wayne Township vs. Porter*, 138 Pa., 181.

Poor—Continued.

10. Where a person abandons his settlement here and acquires a settlement in another state, his status on returning to Pennsylvania is that of a foreigner with respect to the laws of this state relating to paupers. *Juniata Co. vs. Overseers*, 107 Pa., 68. 11. A pauper having acquired no settlement in her own right, has only the settlement of her father. *Northmoreland vs. Monroe*, 1 C. P. Reporter, 149. 12. Where an indigent insane person has no legal settlement in the state, then his place of residence shall be held to be his place of settlement, and such district is liable for expenses incurred in his behalf. *Overseers vs. Forest Co.*, 91 Pa., 404. 13. Where a pauper has been divorced from her husband, her settlement is in the district in which her husband resided at the time of the divorce. *Overseers of Lake District vs. South Canaan*, 87 Pa., 19. 14. Where a party abandons his domicil in this state and moves elsewhere, and children are born to him, who upon his death move to Pennsylvania, held, that they have no legal settlement here, and must be supported by the district in which they first become chargeable. *Overseers of Limestone vs. Overseers*, 87 Pa., 294. 15. Where a poor person, who has acquired a settlement in this state, removes therefrom to another state and there acquires a settlement, but subsequently returns to this state, the poor district to which he comes and first becomes chargeable is liable for his support. *Plumcreek Township vs. Elderton*, 129 Pa., 626. 16. The district in which a poor person having no legal settlement within the state, first becomes helpless and a fit subject for relief, must provide the same until the necessity ceases. The fact that he boarded and lodged in another district at the time of the accident, which made relief necessary, gave him no settlement there, so as to make that district liable. *Taylor Overseers vs. Shenango*, 114 Pa., 394.

II. NEGLECT OF DIRECTORS. The directors of a relieving poor district are bound to exercise due diligence. They cannot delay indefinitely to take out an order of removal or give notice, and then come upon the district alleged to be the place

Poor—Continued.

of settlement for past support. *Luzerne Co. Central District vs. Pittston*, 7 Kulp, 199. *Overseers of Half Moon vs. Renovo*, 2 W. N., 85.

III. NEGLECT OF OVERSEERS. Directors or overseers of the poor may be indicted at common law for wilfully neglecting or refusing to discharge their duties to paupers under their charge. *Comm. vs. Coyle*, 160 Pa., 36.

IV. NEGLECT TO ASCERTAIN PLACE OF SETTLEMENT. Where the relieving district neglects to promptly ascertain the place of proper settlement of a pauper and notify the authorities thereof, it cannot claim reimbursement for his maintenance during such delay. *Northampton Co. Directors vs. Overseers*, 3 C. P. Reporter, 185.

V. NEGLECT TO MAINTAIN. *Assumpsit* will lie by one poor district against another for maintenance of a pauper belonging to the latter district. Notice must precede the suit. *Danville vs. Montour Co.*, 75 Pa., 35.

VI. NEGLECT TO PAY FOR REMOVAL OF PAUPER. Where under an order of removal of a pauper, the pauper has been accepted, there can be no recovery against the accepting district for costs and charges. *Renovo Overseers vs. Half Moon*, 78 Pa., 301.

VII. NEGLECT TO PROVIDE FOR. Even if a city be under obligations to provide for its poor, yet it does not follow that it is under obligations to pay those who voluntarily contribute to that support. No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other. *Salsbury vs. Philadelphia*, 44 Pa., 303.

Postmaster.

NEGLECT OF DEPUTY. A postmaster, though answerable for want of attention to the official conduct of his subordinates, is not responsible for their secret delinquencies, and no action will lie against him for the act of a deputy in purloining a letter. *Schroyer vs. Lynch*, 8 W., 453.

Powder.

NEGLECT IN STORING. 1. An injunction was asked to restrain the further storing of gunpowder in a magazine which had been used for that purpose for twelve years. It not appearing that there was an increase of risk or change in the surroundings, the application was refused. *Booth vs. Russell*, 3 Montgomery Co., 131. 2. Where a storehouse becomes necessary for keeping a dangerous explosive, the utmost care should be taken in selecting the site, and in its construction with reference to safety of persons and rights of property. Such places should not be multiplied beyond the requirements of the neighborhood. *Dilworth's Appeal*, 91 Pa., 247. 3. A powder magazine, which is a building for storing large quantities of gunpowder, is a nuisance if located in the midst of a thickly-settled neighborhood, and courts will enjoin its erection in such localities. It is futile to calculate, as if by a mathematical formula, the force, size and direction of projectiles impelled by an explosion. It requires a much clearer case for a chancellor to compel the removal of an establishment in which the owner has invested his capital and carried on his business a long time, than of one to be established for the first time against notice of an intended application to prevent it. *Weir's Appeal*, 74 Pa., 230.

Power of Attorney.

I. NEGLECT IN SIGNING IN BLANK. Certificates of stock with blank power of attorney irrevocable endorsed should be guarded against the fraudulent insertion of names. *Aull vs. Colkett*, 2 W. N., 322.

II. NEGLECT IN GIVING. The warrant of attorney of an infant is absolutely void, and is incapable of ratification. *Lutes vs. Thompson*, 5 Pa. County, 451.

III. NEGLECT TO FILL IN BLANK SPACES. The maxim where an error or fraud occurs, in such case "when one or two innocent parties shall lose by the act of a third, he shall bear the loss who has armed the wrong-doer with power to do the injury." *Moodie vs. Bank*, 3 W. N., 118.

Power of Attorney—Continued.

IV. NEGLECT TO PROPERLY ACKNOWLEDGE. Powers of attorney executed beyond sea for the sale of lands in Pennsylvania, have been held good on proof of their having been acknowledged before the mayor of a city, although our act of assembly of 1705 requires proof by the oaths of two witnesses. The act of April 3, 1840, dispenses with the proof of the seal, where the acknowledgment is according to the existing laws of the commonwealth, although the official seal must be attached. *Bowser vs. Cravener*, 36 Pa., 142.

V. NEGLECT TO REVOKE. 1. The powers of the substitute of an attorney in fact ceases upon the death of such attorney. *Lehigh Navigation Co. vs. Mohr*, 3 W. N., 322. 2. A power of attorney ceases to be operative upon the death of the party giving it, unless it is coupled with such an interest as renders it irrevocable. It must be an interest in the subject upon which it is to operate, not an interest in that which is produced by the exercise of the power. *Yerkes' Appeal*, 99 Pa., 401.

Practice.

I. NEGLECT IN SERVICE OF PROCESS. No sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. When the courts of a sister state have jurisdiction, its judgments are final and conclusive in every other state. *Reber vs. Wright*, 68 Pa., 471.

II. NEGLECT TO GIVE NOTICE. Due written notice of a motion for a new trial must be given the adverse party or his attorney. *Galloway vs. Negle*, 1 Y., 103. *Furry vs. Stone*, *Idem*, 186.

Prisoners.

I. NEGLECT TO CONFINE. Under the act of May 6, 1887, the county commissioners, with the assent of the court of quarter sessions, or of a judge thereof, in vacation, may discharge from confinement one who has been sentenced in a

Prisoners—Continued.

criminal proceeding to pay costs only, without any actual imprisonment, and without proceeding under the insolvent laws, provided the prisoner has resided in this state for six months. A sentence to pay costs only, or a fine of less than fifteen dollars and costs, is discharged absolutely by thirty days' imprisonment, if the prisoner has been a resident of the state for six months. *Conley's Petition*, 11 Lancaster Review, 231.

II. NEGLECT TO DISCHARGE. 1. Under the provisions of the act of June 13, 1883, authorizing county commissioners discharging from prison convicts without taking the benefit of the insolvent law, no discharge can be allowed until after three months confinement has elapsed. *Carey's Petition*, 4 Culp, 141. Lehigh Valley Rep., 345. 2. The power to discharge prisoners committed for costs alone, is vested in the county commissioners, but it seems that no discharge can be made until after confinement. *Comm. vs. Frior*, 2 Pa. County, 58. 3. A prisoner who is a fugitive from justice, is not entitled, after he is caught and detained, to be discharged on the two-term rule. *Comm. vs. Hale*, 13 Phila., 452. 4. Where a prisoner has been convicted of a capital offence, and a new trial has been granted, not for error in law, but as a matter of grace, the prisoner will not be discharged under the two-term rule. *Comm. vs. McGurk*, 15 Phila., 349. 5. A defendant is entitled to a discharge under the insolvent laws, where the damages found by a jury are less than \$100, even in an action founded upon actual force. *Dimmick's Case*, 10 Lancaster Review, 414. 6. A person arrested under a *capias ad satisfaciendum*, and applying for a discharge under the insolvent laws, must have undergone an actual imprisonment of at least sixty days. *Scranton's Appeal*, 33 Pittsburgh Journal, 5.

III. NEGLECT TO TRY. 1. A prisoner who obtains continuances when he has a right to demand trial, and who has also been a fugitive from justice, cannot demand a trial when the commonwealth is not ready. *Comm. vs. Pulte*, 14 Phila., 398. 2. A defendant, who has not been tried, is entitled to

Prisoners—Continued.

his discharge upon the last day of the second term, unless the delay is caused by his own act, or is made necessary by the law. *Comm. vs. Superintendent*, 4 Brewster, 320. 3. Under the two-term rule, if a prisoner is not tried at any time during the two terms succeeding his incarceration, he will on application be discharged. A fugitive who afterwards surrenders himself is not entitled to this privilege. *Comm. vs. Superintendent of Prison*, 7 W. N., 359.

Process.

I. NEGLECT IN DATE OF SUMMONS. An error as to the time of return of a summons is cured by the defendant's appearance and willingness to proceed to a hearing. *Stroup vs. McClure*, 4 Y., 523.

II. NEGLECT IN ISSUING SUMMONS. A non-resident defendant, having been sued before a justice of the peace with a long summons, accepted service. Held, that such acceptance did not estop him from setting up want of jurisdiction in the justice. *Fulmer vs. Kinney*, 1 Northampton Co., 211.

III. NEGLECT IN RETURN OF SUMMONS. 1. The true rule in computing the five days between the issuing of a summons by a justice of the peace and the return day is to exclude the day on which it was issued. *Ferris vs. Zeidler*, 4 Kulp, 396. 8 Luzerne Register, 221. 2. A return to a summons issued by a justice, "served this writ on the within-named defendant by leaving at his last place of residence, in presence of a member of the family, a true copy of the same," is defective. The words "dwelling-house" are safer to use than the word "residence." *Mulligan vs. Riley*, 1 Kulp, 79. *Tubbs vs. Drum*, *Idem*, 512.

IV. NEGLECT IN SERVICE OF CAPIAS. 1. While a witness is attending court at the request of the commonwealth, in obedience to a subpoena, he cannot be arrested upon a *capias*. *Wilson vs. Boyd*, 14 W. N., 438. 2. A person held to bail by a magistrate, charged with committing a crime, is not privileged from arrest on civil process while returning from

Process—Continued.

the office of the magistrate. Such a man does not come within any of the classes of persons who are exempted by law, whilst going to, attending on, or returning from judicial proceedings. *Key vs. Jetto*, 1 Pittsburg, 117.

V. NEGLECT IN SERVICE OF SUMMONS. 1. Leaving a copy of the writ with a visitor of the co-tenant of the defendant is not a sufficient service. *Gould vs. Saunders*, 13 W. N., 517. 2. A member of the legislature, while visiting his home during a session of the legislature is privileged from service of process in a civil action. An attorney at law is also exempt while in attendance at court. *Gray vs. Sill*, 13 W. N., 59. *Young vs. Armstrong, Idem*, 313. 3. When a defendant is not within the jurisdiction nor has a residence there, and does not voluntarily appear to answer to the suit, by himself or his attorney, notice of the suit or even process served in another jurisdiction will have no extra-territorial effect. *Scott vs. Noble*, 72 Pa., 120. 4. The service of a summons will be set aside, if it appear that the copy served was not attested by the officer. *Bank vs. Perdriau*, Brightly's Rep., 67. 5. A summons can be served in two ways: (1) By producing the original summons to the defendant and informing him of the contents thereof. (2) By leaving a copy of it at his dwelling-house in the presence of one or more of his family or neighbors. *Berrill vs. Flynn*, 8 Phila., 239. 6. A suitor, attending a hearing before a magistrate, is privileged from the service of a civil process while in such attendance, and in coming to and returning from the hearing. *Carstairs vs. Knapp*, 10 Montgomery Co., 164. 35 W. N., 292. *Torry vs. Bast*, 3 W. N., 63. 7. Where the return of a constable was "copy of the within served personally," it was held that this was not a proper service of the process. The only personal service known to the law, is where the original summons is produced to the defendant and the contents thereof made known to him by the officer. *Comm. vs. Dalling*, 2 Parsons, 290. *Leis vs. Leis*, 1 Woodward's Decisions, 15. *Achy vs. Kline, Idem*, 162. *Beyerly vs. Hunger, Idem*, 354. *Wagenhorst vs. Smith, Idem*, 421. 8. A return to

Process—Continued.

a summons, "served personally on the within-named party," is bad. *Comm. vs. Savery*, 1 Chester Co., 179.

9. A formal defect in a summons and its service is waived, if the party does not object to it at the earliest possible time when the court is in session. *Cooper v. Maclauchlin*, 1 Pearson, 166.

10. The act of March 20, 1810, requires in case of personal service of a summons issued by a justice of the peace, that it shall be by producing the original summons to and informing the defendant of the contents. This requirement is not satisfied by handing to the defendant a copy of the writ. *Del. & Lackawanna R. R., vs. Plymouth*, 6 Kulp, 91. *Snyder vs. Carfrey*, 54 Pa., 90.

11. When the return of a summons is regular on its face, it will not be set aside because the defendant was induced to come within the jurisdiction by a letter from the plaintiff inviting him for another purpose. *Fearl vs. Hanna*, 129 Pa., 588.

12. The want of notice of service is cured by actual appearance. *Fox vs. Reed*, 3 Grant, 81.

13. A party in attendance upon court is privileged from service of process, but a failure to assert the privilege promptly is a waiver of it. *Hendrick vs. Gates*, 3 C. P. Reporter, 160. *Watson town Bank vs. Messenger*, Northumberland News, 137. *Massey vs. Danton*, 12 W. N., 436. *Ruger vs. Keller, Idem*, 371.

14. If the defendant is decoyed into the jurisdiction of the court by the plaintiff, or by any one on his behalf, the service of a summons upon him will be set aside. *Hevener vs. Heist*, 9 Phila., 274. 4 Legal Opinion. 544. *Sloan vs. Green*, 7 W. N., 408.

15. A party attending an equity cause before an examiner is privileged from the service of a summons. *Huddeson vs. Priser*, 3 Legal Opinion, 278. 9 Phila., 65. *Wilber vs. Boyer*, 1 W. N., 154.

16. It is not a good defence to an action, that the defendant was fraudulently decoyed to the state in which he was sued, for the purpose of obtaining a service of the process upon him. *Luckenbach vs. Anderson*, 47 Pa., 123.

17. A party to a civil suit is privileged, while in attendance at a trial, from the service of a writ in any other civil proceeding. No such privilege exists, where the party served is a defendant

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in a criminal indictment. *Moyer vs. Place*, 13 Pa. County, 163. *Comm. vs. Huntzinger*, 2 Schuylkill Record, 180. 18. A foreign corporation cannot be summoned by a service on its chief officer, who at the time of service may be within the territorial jurisdiction of this court. Such service will be set aside on motion. So also the suitor of a court of another county, who comes here to have his deposition taken. *Nash vs. Lutheran Church*, 1 Miles, 78. *Wetherill vs. Seitzinger, Idem*, 237. *Wheelan vs. Stedman*, 7 W. N., 17. 19. The service of a summons on a traveling agent of an insurance company, or upon one authorized only to effect insurances, is not a valid service upon the company. *Parke vs. Comm. Ins. Co.*, 44 Pa., 422. 20. Where an act of assembly requires the service of a summons to be made within a certain time before it is returnable, a subsequent service is void. *Pinchin vs. Fry*, 1 D., 405. 21. A legislator is privileged from service of all civil process during his attendance on the public business. *Ross vs. Brown* 7 Pa. County, 142. 22. The plaintiff in an action was in attendance in court. At the conclusion of the trial, as he was starting for his home in another county, a summons was served upon him. Held, that the service of the writ must be set aside. *Rupert vs. Creswell*, 1 Chester Co., 443. 23. A summons from a justice need not be served on an "adult" member of the family. The language of the act of March 20, 1810, is this: "or leaving a copy of it at his dwelling-house in the presence of one or more of his family." *Schilki vs. Moyer*, 14 Luzerne Register, 524. 3 Kulp, 512. 24. Where a summons is served upon an attorney at law while engaged in taking depositions in a case in which he is a party in a county other than that of his residence, the service will be set aside. A witness in a case on trial, who did not linger after his testimony was taken, but followed the most direct route to his home, is exempt from service of a writ going or returning from the trial. *Sencer vs. McCormick*, 2 Pa. Dist., 763. *Tyrone Bank vs. Doty, Idem*, 558. 25. A return of personal service of a summons, which does not show that the

Process—Continued.

original summons was produced to the defendant, is insufficient. *Shourds vs. Way*, Leg. Gaz. Report, 391. 26. Where, during the attendance of a defendant in a criminal case upon the trial, he is served outside the court-house, it will be allowed to stand. Where a *capias* is issued against him, the personal service will not be interfered with, but he will be discharged on common bail. A wrong service is cured by the appearance of the parties. *Treichler vs. Hauck*, 1 Foster, 87. 2 Woodward's Decisions, 19. 26 Pittsburg Journal, 7. *Hoffman vs. Gallagher*, 3 Foster, 70. *Baltimore Aid Society vs. Keeley*, 2 Pa. Dist., 62. 27. Under the act of June 13, 1836, the return of a sheriff to a writ of summons "summoned by leaving a copy at place of residence," is insufficient, and on motion will be set aside. *Weaver vs. Springer*, 2 Miles, 42. 28. To constitute a valid service upon the clerk of a non-resident, doing business in this state, under the act of April 21, 1858, the defendant must be permanently residing out of the state at the time of service. *Lanahan vs. Collins*, 6 W. N., 253. 29. A general appearance by a party after service is a waiver of all defects in the writ and the service thereof. *Schober vs. Mather*, 49 Pa., 21.

VI. NEGLECT OF SERVICE OF SUMMONS. Where several makers of a promissory note were sued, and process only served upon one against whom judgment was obtained, proceeding by alias summons against the others is irregular. The act provides, that the judgment against those served shall not be a bar to a recovery, in another suit, against the defendants not served with process. *Myers vs. Nell*, 84 Pa., 372.

VII. NEGLECT TO APPEAR. If two are jointly sued and summoned, and only one appears, the course is to take judgment by default against the one not appearing; to declare against both, and try the issue tendered by the other. *Marshall vs. Gougler*, 10 S. & R., 164.

VIII. NEGLECT TO ASK DISCHARGE ON COMMON BAIL. Before the return of the *capias*, the question of bail may be brought before a single judge, but after the return, it must be

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decided on an application to the court. *Borger vs. Searle*, 2 D., 110.

IX. NEGLIGENCE TO OBJECT TO. 1. A general and unqualified appearance by counsel entered on the proper docket is a waiver of all defects or irregularities affecting the notice, process or service necessary to obtain jurisdiction over the defendant. *Kemmerer vs. Markle*, 3 Pa. Dist., 652. 2. Objections to defects in process or its return must be made before appearance by defendant. Defendant waives his right to be sued in the proper county, when he enters a general appearance, the court having jurisdiction of the subject-matter. *Stelwagon vs. Ins. Co.*, 17 Phila., 247. 3. A witness or suitor, entitled to privilege from arrest or service of summons on account of being in attendance at court, or before a magistrate, must assert his privilege in due time. If he take any step in recognition of the plaintiff's right to sue him, or is guilty of laches, it is a waiver of his privilege. *Watson Bank vs. Messinger*, 6 Pa. County, 609.

Promises.

I. NEGLIGENCE IN LANGUAGE USED. The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not to receive that construction. The declaration of the obligation should be explicit. The act of 1855 requires such promise to be in writing, where the amount reaches the sum of twenty dollars. *Tucker vs. Bitting*, 32 Pa., 430.

II. NEGLIGENCE OF CONSIDERATION. 1. Forbearance is a good consideration for a promise. *Bell's Estate*, 4 Montgomery Co., 175. 2. A consideration is sufficient to support a promise, if it be either a benefit to the party promising, or a loss to him to whom the promise is made, or if the promisor be under a legal, equitable or moral obligation to do what he promises; or if he, to whom the promise is made, trusting to it, foregoes an advantage, or suffers a consequential loss.

Promises—Continued.

Lacaze vs. Penna., **Addison's Rep.**, 106. 3. A promise without any consideration is void; and the law will not infer or imply a promise, if there is no consideration or moral obligation to support it. *Stirling vs. Stewart*, 74 **Pa.**, 445. 4. A promise by a creditor of a firm to release a partner who has retired from the firm, and that he would look to the continuing partner only for payment of his debt, unless founded on legal consideration, cannot be enforced. *Walstrom vs. Hopkins*, 103 **Pa.**, 118.

III. NEGLECT TO FULFIL. 1. When there is a promise to pay at a specified time if a particular event should happen, the time for performance and payment is definite, and no liability arises unless the event happens within the time for performance. When the promise is to pay on the happening of an event, the time for performance and payment is indefinite. *Benninger vs. Hankee*, 61 **Pa.**, 343. 2. To sue upon an unfulfilled promise, the promise must have been made to the plaintiff or his authorized agent. A promise made to a stranger who has no interest in the transaction does not bind the promising party. *Croman vs. Stull*, 119 **Pa.**, 99. 3. When the interest of a man is promoted, though not at his request, and he afterwards deliberately promises to pay for it, the promise will bind him. *Greaves vs. McCallister*, 1 Browne, 109. 4. A promise to pay a debt from which the debtor has been legally discharged in bankruptcy proceedings, that will bind the debtor, must be a clear, distinct and unequivocal promise to pay the specific debt without qualification or condition. *Hobough vs. Murphy*, 114 **Pa.**, 358. 5. A promise in writing to pay a certain sum towards the erection of a church, made without consideration, and where it does not appear that others were induced to subscribe, or that any work was done on the faith of it, is rendered void by the death of the promisor within one month thereafter. *Reimensnyder vs. Ganz*, 110 **Pa.**, 17. 6. A contract to marry without specification of time, is a contract to marry within a reasonable time. In determining what is a reasonable time, the age of the parties,

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their pecuniary ability, and in general the circumstances of the particular case are to be taken into account. *Wagenseller vs. Simmers*, 97 Pa., 465. *Stevenson vs. Pettis*, 12 Phila., 468. 7. An empty promise without more is not sufficient to support a legal contract. *Walstrom vs. Hopkins*. 30 **Pittsburg Journal**, 391.

IV. NEGLIGENCE TO PAY ANOTHER'S DEBT. 1. The evidence of a promise to pay the debt of another must be clear, explicit and certain, and is a question of fact for a jury. *Kerns vs. Young*, 34 Pa., 60. 2. The promise of one partner that the firm will pay the debt of a third person, is not binding on his copartners. *McQuewans vs. Hamlin*, 35 Pa., 517.

Promissory Notes.

I. NEGLIGENCE ALLEGED BY ANTE-DATING. A note may, for honest purposes, be dated as of a day antecedent to that on which it was really made. *Richler vs. Selin*, 8 S. & R., 425.

II. NEGLIGENCE, RESULTING FROM FORGERY. Evidence by experts by comparison of handwriting is not allowed as an independent proof. The comparison must be made by the jury. *Travis vs. Brown*, 45 Pa., 9. *Haycock vs. Greup*, 57 Pa., 438. *Aumick vs. Mitchell*, 82 Pa., 211.

III. NEGLIGENCE, RESULTING IN LOSS. 1. To avoid the necessity of giving indemnity, the burden is on the plaintiff who seeks to recover against the maker of a lost negotiable note, to prove that the note was not endorsed before it was lost. *Bigler vs. Keller*, 8 W. N., 223. 2. It is not sufficient that the copy filed should be "as near as can be ascertained." Defendant is entitled to indemnity before judgment will be given against him on a lost note. *Jordan vs. Kellar*, 5 W. N., 341. *Yerkes vs. Mooney*, 1 W. N., 433.

IV. NEGLIGENCE BY ALTERATION. 1. If the maker of a note or check issue it in such a condition that it can easily be altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturing. If there be no negligence in the maker, the good faith and

Promissory Notes—Continued.

absence of negligence in the holder cannot avail him. *Brown vs. Reed*, 79 Pa., 370. 2. The alteration of the date of a note is material. In the absence of proof the presumption governing negotiable paper is that the maker issued it clear from all blemishes, erasures and alterations. If the alteration is apparent on inspection, the court will require explanatory evidence before admitting it. *Citizens' Savings Bank vs. Coon*, 2 Kulp, 134. 11 Luzerne Register, 168. 3. Where a promissory note has evidently been altered in some material part, such as its date, it is incumbent upon the party producing it to account for the alteration, and if no explanatory evidence be given, it would be error to refer it to the the jury determine whether the alteration preceded delivery. *Clark vs. Eckstein*, 22 Pa., 507. 4. Whenever a promissory note is altered, after its execution, in such manner as to impose upon the promisor any burden or peril which he would not otherwise have incurred, this is such a material alteration as will avoid the note as to him. This, too, even though the pecuniary liability be not increased or the time of payment changed thereby, and even though the same be honest and made with no fraudulent intent. *Craighead vs. McLoney*, 99 Pa., 211. *Hoover vs. Dieser*, 7 Lancaster Review, 41. 5. If there be a material alteration in a promissory note by the payee, after delivery, wilfully, however innocent the intention, or however slight the prejudice to the maker, the instrument is avoided. *Fisher vs. King*, 153 Pa., 9. 6. Any alteration of negotiable paper, even when beneficial to the maker, must be explained. *Frey vs. Wessner*, 1 Woodward's Decisions, 145. 7. One who makes a voluntary and unauthorized alteration in an instrument, and insists upon it by going to trial on it, has no *locus penitentiae*, by which on his failure to establish his right to recover, he can undo the wrong. *Fulmer vs. Seitz*, 68 Pa., 237. 8. If a bill or check be drawn in so careless a manner as to enable a third person to practice a fraud, the drawer and not the banker must bear the loss. If one by his acts, or silence, or negligence, misleads another, whereby an

Promissory Notes—Continued.

innocent person suffers a loss, the blamable party must bear it. In the present case, the drawer of a note for one hundred dollars omitted to draw a line after the amount, but left a blank space, in which the payee fraudulently wrote the words "and fifty," making the note to read "one hundred and fifty dollars." Held, that the maker was liable for the altered face of the note to a *bona fide* holder for value. *Garrard vs. Haddan*, 67 Pa., 82. 9. An alteration of a negotiable note made by a visible interlineation of the words "with interest at six per cent.," without the knowledge or consent of the owner, renders the note absolutely void even in the hands of an innocent purchaser for value. *Gettysburg Bank vs. Chisolm*, 169 Pa., 564. *Myers vs. Nell*, 84 Pa., 369. 10. An immaterial alteration of a note, which changes neither names, dates, amount, rate of interest, time of maturity, place of payment or liability of any one, in the absence of proof of fraud, does not invalidate the note. *Hadley Falls Bank vs. Loudenslager*, 2 Pa. Dist., 654. *Hepler vs. Bank*, 13 Lancaster Bar, 181. *Gardiner vs. Fisk*, 3 Pa., 326. 11. Any alteration, even of a letter, in an instrument, whereby a new operation is given to it, is termed a forgery, where done without the knowledge or consent of the maker of it. *Hocher vs. Jamison*, 2 W. & S., 438. 12. Where a note was executed on January 3, and through inadvertence was made to bear the date of the previous year, an alteration of the date by the holder to express the intention of the parties was not such a change as would avoid the instrument. *Hammerschlag vs. Bank*, 13 W. N., 205. 13. The holder of a promissory note, the date of which appears, upon inspection, to have been altered, must explain the alteration, and show it has been lawfully made, before it can be given in evidence. The maker of a note is presumed to have made it clear of blemishes, erasures and alterations; and the burden of showing it was defective, when issued, is upon the holder. Such evidence is for the jury. *Heffner vs. Wenrich*, 32 Pa., 423. *VanDusen vs. Thomas*, 10 W. N., 190. 14. Where, in a promissory note, the place of payment was

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added after it was signed, the alteration is material ; and where there is no evidence to explain, the note is inadmissible. The burden of proof that the alterations were lawfully made, is upon the holder. *Hill vs. Cooley*, 46 Pa., 259. *Southwark Bank vs. Gross*, 35 Pa., 80. 15. A note is vitiated by the alteration of the date, unless the holders account for the alteration. The presumption that a note has been altered sets aside the presumption of its regular negotiation and admits the parties to testify, if not interested. *Kennedy vs. Bank*, 18 Pa., 347. 16. If the alteration of a note be made fraudulently, or the original words cannot be certainly restored, or any party has become affected by it or related to it, so that the alteration will do him wrong, the party making the alteration must abide by it and its consequences ; otherwise he may restore the note to its original form and force. *Kountz vs. Kennedy*, 63 Pa., 187. 17. Where, after the signing of a promissory note by a surety, it is discovered that the name of the payee is erroneous, and the same is corrected by the principal debtor without the surety's knowledge or consent, it does not constitute such a material alteration, as to discharge the surety from liability on the note. If the alteration has been made fraudulently, or if any party has become interested in the note or affected by it or related to it since the alteration in such a way that the restoration will do any wrong to this party, the party must abide by the alteration he has made. *Kountz vs. Kennedy*, 63 Pa., 187. *Latshaw vs. Hildebeitel*, 12 W. N., 335. 18. Where a promissory note was altered by raising it from eight to eighty dollars by the mere addition of the letter " y " and a cipher after the figure 8, it not appearing that there was negligence in the manner the note was originally drawn, held, that even a *bona fide* holder cannot recover the sum of eighty dollars. *Lear vs. Walls*, 101 Pa., 57. 19. When the alteration of a note, bill or bond is made by the voluntary act of the creditor, and affects injuriously the responsibility of the debtor, the security is gone. It is inapplicable to an alteration, which leaves the legal effect of the

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instrument as it was before. *Miller vs. Gilleland*, 19 Pa., 119.

20. The *onus* of showing that an alteration in a material part of a note was lawfully made, is on the holder. Where the parts are in a different handwriting, there is a presumption of alteration. *Simpson vs. Stackhouse*, 9 Pa., 186. *Miller vs. Reed*, 3 Grant, 52. 25 Pa., 244. *Paine vs. Edsell*, 19 Pa., 180. *Hopkins vs. Reed*, 1 Pittsburg, 120. *Weiser's Estate*, 5 York Record, 5.

21. If an alteration has been made by the plaintiff of a note after it came into his hands, with fraudulent intent, there can be no recovery against maker or surety. *Miller vs. Stark*, 148 Pa., 164.

22. The rule that an apparent alteration invalidates negotiable paper, does not apply with equal strictness to sealed instruments. *Myton vs. Duff*, 3 Walker, 412.

23. A voluntary alteration of a note in a material part to the prejudice of the maker avoids it, unless done with the consent of the parties affected by it. Such a wilful act differs from spoilation by a stranger, or accidental alteration done through mistake, where the note remains effectual in law, as it was before alteration. In the alteration of commercial paper, the rule is even more stringent than as to the alteration of instruments under seal, the law casting on the holder the burden of disproving any apparent material alteration on the face of the paper. *Neff vs. Horner*, 63 Pa., 330.

24. The subsequent filling out of a commission clause in a note upon which judgment is entered, is a material alteration sufficient to avoid the note. Full justice, however, may be accomplished by striking out that portion of the judgment and allowing the rest to stand. *Rollins vs. Evans*, 2 Lackawanna Jurist, 33.

25. A promissory note, of which the date has been altered without the consent of the defendant, the endorser, is thereby rendered void, even in the hands of an innocent endorsee. *Stevens vs. Graham*, 7 S & R., 504. *Mylin's Estate*, 7 W., 69.

26. A promissory note which shows on its face a material alteration, is not admissible in evidence without an explanation of the alteration showing that it was lawfully made. He who takes a blemished note, takes it with its imperfections on its

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head. He becomes sponsor for them, and though he may act honestly, he acts negligently. The burden of proof that the alterations were lawfully made is upon the holder. The parties affected by it must assent to the alteration. *Simpson vs. Stackhouse*, 9 Pa., 186. *Hartley vs. Corboy*, 150 Pa., 23. 27. The addition of a place of payment in the body of a promissory note by the maker, after its endorsement for his accommodation, by filling in a blank in the printed form, is not such an alteration of the note as will discharge the endorser. *Wessell vs. Glenn*, 108 Pa., 104. 28. Where a note is executed by two or more parties, any alteration in it, without the consent of all, will avoid the note as to the party not assenting. *Wiseman vs. Fleischer*, 6 Kulp, 275. 29. Where the maker of a promissory note, which had been drawn by him for a certain sum, and endorsed for his accommodation, afterwards altered it to a larger sum by means of a space in the printed form left vacant, it was held that the holder was entitled to judgment for the true amount of the note against the endorser. *Worrall vs. Gheen*, 39 Pa., 388. 30. The maker of a promissory note must guard the public against frauds and alterations, by refusing to sign negotiable paper which is in such form as to admit of fraudulent practices with ease and without ready detection. In the present case, there was written on the margin of the note, that it was given for a patent, and not to be paid until a profit specified was made. This condition was subsequently cut off, and the note passed to a *bona fide* endorsee for value without notice. The consideration failing could not be pleaded as a defence against an innocent holder. *Zimmerman vs. Rote*, 75 Pa., 188.

V. NEGLECT BY FORGING. When the endorsement of a note is forged, such indorsement cannot be ratified by the person whose name is forged, as the act is criminal and against public policy. *Shisler vs. Vandike*, 92 Pa., 447.

VI. NEGLECT BY RELEASE OF MAKER. If the endorsee of a note, after obtaining judgment against the maker, should discharge him from custody, under a *ca sa*, issued by virtue of

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the judgment, the debt will be extinguished, and the endorser released. *McFadden vs. Parker*, 4 D., 275.

VII. NEGLECT BY SEALING. An instrument is a specialty, whatever may be its form, if it be under seal. If a promissory note be signed by three parties, and one of them affixes his seal to his signature, a joint action cannot be maintained against the three; and if the seal be affixed afterwards in the absence of the other two, the instrument is rendered void as to the latter. *Frevall vs. Fitch*, 5 Wh., 325.

VIII. NEGLECT BY SIGNING ON SUNDAY. 1. In an action upon a promissory note, proof that it was signed on Sunday is a defence against recovery of judgment. If, however, the contract upon which it was given was made on some other day, an action will lie upon the contract. *Kepner vs. Keefer*, 6 W., 231. *Linden vs. Hicks*, 5 Legal Opinion, 24. 2 Luzerne Register, 201. 2. A promissory note signed on Sunday, though dated on Saturday, but not delivered until Monday, is valid. *McCauley vs. Phipps*, 1 Chester Co., 495.

IX. NEGLECT BY WHICH LOST. When diligent search has been made, unsuccessfully for a note, by the person in whose hands the law presumes it to be, it is in judgment of law a lost paper, and secondary evidence of its contents is admissible. *Bell vs. Young*, 1 Grant, 175. *Bigler vs. Kellar*, 12 Lancaster Bar, 60.

X. NEGLECT IN ACQUIRING TITLE. Mere suspicion by the purchaser of a note of the title of the holder thereto at the time of delivery, would not prove that he had knowledge that such holder was guilty of a breach of trust in passing it. *Gilmore vs. Moorhead*, 21 Pittsburg Journal, 111.

XI. NEGLECT IN BEING EXECUTED UNDER DURESS. Where a note was obtained by threats of personal injury or by a pretence of impending arrest, it cannot be collected by the original holder. *Longbotham vs. Longbotham*, 2 Delaware Co., 277.

XII. NEGLECT IN COPY FILED. A mere copy of a promissory note, not signed by plaintiff or his counsel, is not a suffi-

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cient statement under the provisions of the act of May 25, 1887; because it does not state the amount plaintiff believes is justly due. *Gould vs. Gage*, 5 **Lancaster Review**, 110.

XIII. NEGLECT IN DATE. 1. The endorsement of a note with the date left out, for the accommodation of the maker in the renewal of a note in bank, is an implied authority to the bank to insert the date, on its acceptance of the note. *Bechtel's Estate*, 133 Pa., 367. 2. The date of a note is not essential to its validity, and if justice requires it, the real date may be inquired into and effect given to the instrument. *McSparran vs. Neeley*, 91 Pa., 17.

XIV. NEGLECT IN DEMAND. A bank is responsible for mistaking the date of a note, received for collection, whereby it was presented for payment before the proper time, and the endorser discharged. *Delaware Co. Bank vs. Broomhall*, 38 Pa., 135.

XV. NEGLECT IN DRAWING. 1. A note to be negotiable, must be for the payment of money at a fixed period or on an event which must inevitably happen. It is not negotiable, if its payment depends upon a contingency, although that may in fact happen. The addition of some words beyond what are necessary to constitute a negotiable promissory note, does not destroy its character as such. *Ernst vs. Steckman*, 74 Pa., 15. 2. A note in the singular number, "I promise," but signed by several, is a joint and several note. *Higerty vs. Higerty*, 5 Clark, 74. 3. Where a note is given for a patent right, and has not the words, "given for a patent right," written across its face, as required by the act of April 12, 1872, an innocent purchaser, for value, of the note is not affected by the act. *Hunter vs. Henninger*, 93 Pa., 373. 4. A promissory note written in lead pencil is valid. *Myers vs. Vanderbilt*, 84 Pa., 513. 5. By the act of April 12, 1872, a note given for a patent right should be so marked on its face. The consideration for such notes may always be questioned. *Weaver vs. Frantz*, 11 W. N., 163.

XVI. NEGLECT IN ENDORSEMENT. 1. Plaintiff sued on a

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note drawn to the plaintiff's order, and endorsed in blank by the defendant. Held, that this was an anomalous instrument, not in mercantile form, and that, therefore, the endorsement of itself contained no obligation. *Allwine vs. Garberich*, 2 Pearson, 28, 30. 2. The value of a note is not destroyed or its negotiability affected by the fact that the payee writes his name upon it in the wrong place, when the mistake is immediately corrected, or that it contains a statement of his financial condition. *Browning vs. Maurer*, 16 Phila., 125. *Dunning vs. Heller*, 15 Lancaster Bar, 60. 3. One who endorses a promissory note, drawn by the maker to his own order, but endorsed by the maker after the said endorser, is liable thereon to the holder of the note. *Central Bank vs. Dreydoppel*, 7 Lancaster Review, 313. 134 Pa., 499. *Ulbert vs. Finletter*, 68 Pa., 247. 4. When a man endorses a note before the payee has done so, he assumes the position of second endorser, and the payee must endorse above his name so as to give him recourse against such payee. Prior to act of April 26, 1855, parol evidence could be offered to show that the intention of the irregular endorser was to guarantee the payment of the note to the payee, but that act of assembly made parol evidence of such a guaranty unlawful. *Lilbert vs. Finkbeiner*, 68 Pa., 247. *Alter vs. Langebartil*, 5 Phila., 151. *Ahlborn vs. Wolf*, 115 Pa., 242. *McNaughton vs. Haldeman*, 5 Delaware Co., 278. 5. Where a promissory note is made to the joint order of two payees, it is immaterial which endorses it first. In such case, the second endorser does not vouch for the genuineness of the first, as in the case of several endorsers. *Foster vs. Collner*, 107 Pa., 305. 6. It is not necessary to the validity of an endorsement of a promissory note, that it should be written on the note itself. It may be equally binding if made on a separate paper. *Heister vs. Gilmore*, 5 Phila., 62. 7. Where the name of an endorser is written above that of the payee on a note, evidence that it was placed there after the payee had endorsed, is admissible, and upon such fact being established, the liabilities of the parties are the same as if no mistake had occurred. *Kirk vs.*

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Slack, 18 Pittsburgh Journal, 42. 8. In a suit by a payee of a promissory note against an endorser, where the latter wrote his name before the delivery to the payee to enable the maker to borrow on it from the payee, it is not error to instruct the jury, that if the note was endorsed by the defendant, and a loan was made on the faith of the endorsement, the plaintiff is entitled to recover. If the endorsement is unexplained, the payee cannot recover against the endorser. *Lang vs. Fegenbush*, 4 Pittsburgh Journal, 836. 9. If a note be specially endorsed, its negotiability is at an end, and it becomes incapable of being sued upon by anyone, except the special endorsee. *Lawrance vs. Fussell*, 77 Pa., 463. *Freeman's Bank vs. Butler*, 4 Kulp, 99. 10. When one puts his name on the back of negotiable paper before the payee has endorsed it, the reasonable conclusion is that he means to pledge in some shape his responsibility for the payment thereof. *Lizsman vs. Marx*, 20 W. N., 69. 11. Where the payee of a note endorses his name thereon after the name of a third party, the endorsement is irregular. If, at the time the holder parts with his money, the paper is on its face irregular, out of the usual course of business, its effect cannot be prevented by afterwards putting it into a regular shape. *Losee vs. Bissell*, 76 Pa., 459. 12. Where one puts his name on the back of a note before the payee has endorsed it, he assumes the legal relation of second endorser. An irregular endorsement of a note should put a purchaser on inquiry, and affects him with notice of the equities of the parties. *Swain vs. Halberstadt*, 2 Foster, 160. *Losee vs. Bissell*, *Idem*, 352. 13. An irregular endorser upon a promissory note, without value, is liable only according to the terms of his agreement. *Metz vs. Leibner*, 1 Schuylkill Record, 58. 14. In a suit by the payee of a promissory note against an irregular endorser, the defendant is *prima facie* liable for the amount of the note. *Pentland vs. McClelland*, 1 Pittsburgh, 164. 15. The negotiability of a promissory note is not destroyed by the fact that the endorsement of a corporation thereon was made through its seal. *Rand vs. Dovey*, 83 Pa.,

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280. 16. B made a note payable to T. S endorsed it; afterwards J endorsed it, and it was discounted by a bank for J. Held, that S was not liable either to the bank or to J, without evidence *dehors* that he had assumed the liability. A special agreement in such case might be established by proof. *Schafer vs. Bank*, 59 Pa., 144. 17. Where a third party unintentionally endorses a note above the name of the payee, he is not liable to the payee or to a bank which discounted the note, although the payee is liable to the bank. But if such irregular endorser pays the note, he is entitled to substitution to the rights of the bank against the payee, who had endorsed the note. The former party is the only one who can set up the statute of frauds in the case as a defence. *Slack vs. Kirk*, 67 Pa., 384. *Shenk vs. Robeson*, 2 Grant, 372. *Barto vs. Schmeck*, 28 Pa., 447. *Smith vs. Kessler*, 44 Pa., 144. 18. A payee's name should first be endorsed on a promissory note before any other endorser signs. *Warren vs. Thompson*, 6 W. N., 175. *Smith vs. McElwee*, 1 W. N., 231. *Wardin vs. Balfour, Idem*, 284. 19. Since the passage of the statute of frauds in 1855, where a third party endorses a promissory note before the payee, his irregular endorsement imposed upon him the liabilities of a second endorser, and did not make him liable to the payee. They could not recover against him as a guarantor, because of the statute of frauds; nor as an endorser because they are prior parties to the note. *Temple vs. Baker*, 125 Pa., 641. 20. A forged endorsement of a promissory note is incapable of ratification, and no action can be maintained upon it. Where the fraud involves a crime, no action can be maintained upon it. *Vandike vs. Shisler*, 16 Phila., 4.

XVII. NEGLIGENCE IN FRAUDULENTLY ISSUING. In an action by an endorsee against the maker of a promissory note, proof by the defendant that the note was fraudulently issued puts the plaintiff to proof of his standing as a *bona fide* holder for value. *Lerch Hardware Co. vs. Bank*, 109 Pa., 240.

XVIII. NEGLIGENCE IN GIVING TIME. 1. A definite exten-

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sion of time for a consideration paid by the maker, without the consent of the endorser of a note, discharges the latter. *Siebeneck vs. Bank*, 17 W. N., 72. 111 Pa., 187. 2. Time given to an endorser of a note, or a composition accepted from him by the holder, does not discharge the drawer; yet the maker of accommodation paper is discharged to the extent of the payments made by the endorser to the holder. *Love vs. Brown*, 38 Pa., 307.

XIX. NEGLECT IN INCLUDING USURIOUS INTEREST. 1. The payment of usurious interest on one note cannot be set up as a defence to another note unconnected with it, more than six months after the payment of the usury. *Mountain City Co. vs. Bright*, 2 Schuylkill Record, 215. 2. In a suit by endorsee against endorser, if the original sale of the usurious note was *bona fide*, the usury law does not apply; otherwise, if the note was endorsed as security for a loan. *Wilson vs. Leinbach*, 6 W. N., 483.

XX. NEGLECT IN JOINING THE PARTIES IN A SUIT. Several defendants cannot be joined in an action *ex contractu*, unless their liability be joint. A joint action cannot be maintained against the maker and endorser of a promissory note. *Fawcett vs. Fell*, 77 Pa., 308.

XXI. NEGLECT IN LOCATION OF SIGNATURE. A note drawn in the singular number and signed by several, has been held to be binding as the joint and several note of all. A sealing by one and a signature without seal by another, might be the single bill of one and the promissory note of the other. It matters little where the signature of a party to a writing may be placed, if the instrument imports an obligation or an engagement, and is accordingly so signed. Whether it appear on the right or the left hand of the paper, the signer will be presumed to be bound by it, where no other inference of his intention exists. But this cannot be claimed, where the signature occupies a position that is certainly equivocal. Still less so, when the position is that of a subscribing witness, and

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another has executed the instrument prepared for the signature of but one person. *Steininger vs. Hoch*, 39 Pa., 263.

XXII. NEGLIGENCE IN NEGOTIABILITY. A promissory note having on its face a memorandum as to renewal at maturity, is not an absolute, unconditional contract to pay the money at maturity, and is therefore not a negotiable instrument upon which an endorser is liable. *Citizens' Bank vs. Piollet*, 126 Pa., 194.

XXIII. NEGLIGENCE IN NOTICE. If there is no time mentioned in a note, as where payable at sight, a reasonable time is allowed to make the demand on the promisor. If he refuse to pay, immediate notice must be given by the holder to the endorser. *Brenzer vs. Wightman*, 7 W. & S., 264.

XXIV. NEGLIGENCE IN OBTAINING SIGNATURE. Fraud in procuring a signature to a negotiable note, is no defence against one who purchased the note before maturity in the course of business. *State Bank vs. Schreck*, 1 Foster, 57.

XXV. NEGLIGENCE IN PAYING FORGED NOTES. The fact that an endorser had paid other forged notes, or recognized them as valid, will not estop him from setting up a defence to a forged note. It would be a harsh rule to hold that a man who has paid one or more forged notes to save the honor of the maker, thereby rendered himself liable upon all other forged paper which the makers may have issued. *Cohen vs. Teller*, 93 Pa., 127.

XXVI. NEGLIGENCE IN PAYMENT. If an agent lends his principal's money on a note to himself, the debtor cannot properly pay the agent after he has been informed of the superior right. *Farmers' & Mech. Bank vs. King*, 57 Pa., 202.

XXVII. NEGLIGENCE IN PLACE OF PRESENTMENT. In order to charge an endorser, it is indispensable that the presentment of the note for payment be made at the place designated in the note. In the absence of proof that the presentment was there made, the endorser will be absolutely discharged. *Cecil Bank vs. Holt*, 25 W. N., 386.

XXVIII. NEGLIGENCE IN RENEWING. It is not necessary

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that a promissory note, to be a renewal of a former one, should be for the same amount or have the same time to run. *Fulmer vs. Boyer*, 11 Lancaster Review, 209.

XXIX. NEGLECT IN SIGNATURE. 1. Where it is the intention of parties signing a promissory note to bind themselves only in a representative capacity, they should incorporate in the body of the note "as trustees of" and not "we promise to pay." The addition of official character to the signature will not of itself suffice. *Jones vs. Evans*, 2 Luzerne Law Times, 75. *Washburn vs. Ansley, Idem*, 41. 2. The mere addition of the word "president" after the name of an endorser of a promissory note, without designating the company of which he is president, will not avail to relieve him personally as to strangers. But if the note was given to the holder in payment of a debt due him by a company of which the endorser was president, the case is different. *Seyfert vs. Lowe*, 27 Pittsburg Journal, 32.

XXX. NEGLECT IN SPECIFYING NATURE OF PAYMENT. A note, promising to pay in notes of a particular kind or on certain banks, is not a negotiable instrument on which the endorsee can sue in his own name. *McCormick vs. Trotter*, 10 S. & R., 94.

XXXI. NEGLECT IN TIME OF PAYMENT. Where a note does not specify the time when due it is payable on demand. *Kern vs. Kaffel*, 1 W. N., 105. *Hall vs. Taby*, 110 Pa., 318.

XXXII. NEGLECT OF CONSIDERATION. 1. Upon the defendant proving that a note was improperly obtained, and placed in circulation by duress, felony or fraud, he may call the plaintiff, under a previous notice, to show that he is a *bona fide* holder for value ; but mere absence of consideration between the original parties is inoperative to place the plaintiff on such proof. *Albrecht vs. Strimpler*, 7 Pa., 477. *Porter vs. Gunnison*, 2 Grant, 300. *Durgman vs. Amsink*, 77 Pa., 116. 2. The holder of a promissory note, who had no notice of the equities existing between the maker and the payee, cannot be affected by them, unless he is a holder without consider-

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ation. Where the holder of a note received it for an antecedent debt, he is a holder for a valuable consideration. *Bardsley vs. Delp*, 88 Pa., 420. *Huddell, In re*, 8 W. N., 407.

3. As between the payer and payee of a negotiable note, failure of consideration may be set up as a defence; so, also, as between the payer and a holder, claiming by endorsement or delivery made after the note became due. *Barnet vs. Offerman*, 7 W., 130.

4. Where an accommodation note is procured in bad faith, and is passed to a third person for a valuable consideration, such third person may recover from the maker at least the amount he has actually paid or credited the payee on the faith of the payer. *Beckhaus vs. Bank*, 22 W. N., 53.

5. The mere possession of a note not negotiable implies no consideration for its transfer, and gives the holder no right of action on it in his own name. *Birclebach vs. Wilkins*, 22 Pa., 26.

6. A person who takes a note after it is due, takes it subject to all objections in respect to want of consideration, or illegality, and all other objections and equities affecting the instrument itself, and to which it was liable in the hands of him from whom he takes it. *Bower vs. Hastings*, 36 Pa., 288.

7. When an affidavit alleges failure of consideration, the cause of the failure must be specifically set forth. *Bright vs. Hewitt*, 2 W. N., 626.

8. Where the defence, in an action upon a promissory note is want of consideration, the *onus probandi* is upon him. *Schneider vs. Bechtold*, 3 Phila., 50. *Broadbelt vs. Huddleson*, 2 W. N., 293. *Bank vs. Adams*, 1 W. N., 430. *Hackettstown Bank vs. Matthews*, 3 W. N., 158.

9. Where in a suit on a note by an endorsee, the maker's affidavit of defence sets forth, that the note was obtained by fraudulent representations, and that he believes it was transferred to plaintiff without consideration to avoid this defence, the affidavit is sufficient to prevent judgment. *Boomer vs. Henry*, 2 Pa. Dist., 357.

10. It is a good defence, in a suit on a note by the holder against the maker, that the note was given to the payee without consideration for a specific purpose other than for accommodation, and that the payee endorsed the note

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to the plaintiff to secure a pre-existing indebtedness and without value. *Carpenter vs. Bank*, 106 Pa., 170. 11. The *bona fide* holder of a note, given on an usurious contract, will not be affected by the unlawfulness of the transaction, if he took it without knowledge of the usurious consideration. *Creed vs. Stevens*, 4 Wh., 223. 12. The holder of an accommodation note, pledged as collateral security for an antecedent debt, is not a purchaser for value, and the note in his hands may be impeached for fraud in its making or procurement. *Cummings vs. Boyd*, 83 Pa., 372. 13. Mere inadequacy of consideration, without warranty or fraud, is no defence to the payment of a note, given for the purchase-money of goods. *Eagan vs. Call*, 34 Pa., 238. 14. It is not necessary to give the full face value of a note, in order to become a holder for value. An affidavit of defence, that the payee gave no consideration for the note, is of no effect, in the absence of an explicit denial that the plaintiff is a *bona fide* holder. *Forepaugh vs. Baker*, 21 W. N., 299. 15. A promissory note which has been given in the place of a former one, with an extension of time and the release of an endorser, cannot be defended against on the want of consideration in the original. *Gatzmer vs. Pierce*, 13 Phila., 88. 16. The holder of a note who takes it before maturity in payment of a pre-existing debt, cannot be subjected to equities which might have furnished a defence between the original parties, of which he had no notice. But if the paper be taken as collateral security merely for the antecedent debt, the defendant may aver any ground of defence which would have been competent between the original parties. *Gleason vs. Crider*, 14 Pa. County, 670. *Maynard vs. Bank*, 98 Pa., 250. 17. Where a negotiable note was obtained by fraud, felony or force, and fraudulently put in circulation; in an action by the holder against the maker, the former must show that he is a holder for value before maturity of the note, without notice of the fraud. *Hutchinson vs. Boggs*, 28 Pa., 294. *Gray vs. Bank*, 29 Pa., 365. *Hoffman vs. Foster*,

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43 Pa., 137. 18. Where a note was obtained by duress of the maker who was in prison, and endorsed in good faith, without any knowledge of the duress on the part of the endorser, in a suit by the holder, who was guilty of the duress, against the endorser, the latter may set up the duress of the maker as a defence to the action. *Griffith vs. Sitgreaves*, 90 Pa., 161. 19. He who chooses to sign a negotiable instrument for the benefit of a friend, as the maker of accommodation paper, must abide the consequences, even if his friend pledge it to a third party for an old debt. Proof that it was accommodation paper, will not put the holder on proof of the consideration paid. The legal presumption is that he is a holder for value. This presumption is rebutted by proof that the bill was negotiated after maturity. So, where the note was procured by fraud, the holder must show himself to be a holder for value, before maturity, and without notice. *Hart vs. Trust Co.*, 118 Pa., 569. *Lord vs. Ocean Bank*, 20 Pa., 384. *National Union Bank vs. Todd*, 132 Pa., 312. *Work vs. Kase*, 34 Pa., 138. 20. In a suit by the endorsee of a note against the maker, an affidavit of defence is sufficient, which alleges a good defence to the notes, and that the plaintiff's name is used as a mere cover to prevent a defence against the payee, the real owner. *Delp vs. Sowers*, 5 W. N., 167. *Gordon vs. Stils*, *Idem*, 169. *Harvey vs. Smith*, 4 W. N., 572. *Williams vs. Williams*, 7 W. N., 388. 21. By the act of April 12, 1872, the effect of writing or stamping upon a promissory note the words "given for a patent right" is to render such note in the hands of a purchaser and holder subject to the same defences as if in the hands of the original owner, as that the patent is void, and that the consideration has failed. If these words are not inserted, and an innocent holder takes such note before maturity for value and without notice of the consideration, he takes it clear of all the equities between the original parties. *Haskell vs. Jones*, 86 Pa., 173. 22. The words "without defalcation" in a note under seal, do not preclude the obligor from defending in a suit brought by the assignee for valuable

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consideration. Defalcation is setting off another account or contract—perhaps total want of consideration, founded on fraud, imposition and falsehood, is not defalcation; though being relieved in the same way, they are blended. *Houk vs. Foley*, 2 P. & W., 250. 23. In an action by an endorsee against the maker of a note, the plaintiff is not bound to show what he paid for the note, although notice has been given him to prove the consideration; unless the defendant shows facts which exonerate him from payment, except to a *bona fide* holder. *Jarden vs. Davis*, 5 Wh., 338. 24. On proof of the loss or larceny of negotiable paper, the holder must affirmatively show that he took it in the usual course of business for value. *Kuhns vs. Gettysburg Bank*, 68 Pa., 445. 25. An accommodation note, in the strict sense, is a loan of the maker's credit, without instructions as to the manner of its use. The defendant endorsed a note in blank, and left it to be signed by the maker for a particular purpose. It was not so used, and hence was a fraud upon the endorser. The holders not having obtained the note for a new or valuable consideration were not protected, and could not recover from the endorser. *Lenheim vs. Wilmarding*, 55 Pa., 73. 26. In a suit against the maker of a promissory note, payable without defalcation, by a *bona fide* holder for valuable consideration, evidence cannot be given by the defendant, under a plea of payment, of a failure of the consideration for which the note was given. *Lewis vs. Reeder*, 9 S. & R., 193. 27. The presumption is that the endorsee of a negotiable note obtained it for a valuable consideration in the usual course of business, before it became due. Nothing but clear evidence of knowledge or notice, or *mala fides*, can impeach the *prima facie* title of the negotiable paper, taken before maturity. *Lockhaven Bank vs. Wheeler*, 1 Schuylkill Record, 65. *Pottsville Bank vs. Vandusen*, *Idem*, 185. *Battles vs. Laudenslager*, 84 Pa., 446. *Moorhead vs. Gilmore*, 77 Pa., 119. *Saylor vs. Bank*, 1 Walker, 328. 28. Where a party accepts an over-due note, he takes it with all its imperfections. In an action by the

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assignee or endorsee of such note against the maker, where notice has been given that proof of the consideration for the making and transfer will be required at the trial, evidence to show the note was fraudulently put in circulation is admissible, in order to compel the plaintiff to show the consideration paid. *Maples vs. Browne*, 48 Pa., 458. 29. The endorsee of a negotiable note, who took it before maturity, *bona fide*, for value, without notice, is entitled to recover from the maker, though a fraud was practiced on the latter in obtaining his signature to the note. The defence of drunkenness in the maker cannot be set up against the innocent holder of a negotiable note. The fact that the holder obtained the note under circumstances which ought to have excited suspicion, will not defeat a recovery; it must be shown that it was taken *mala fide*. *McSparran vs. Neeley*, 91 Pa., 17. *Clarion Bank vs. Lawson*, 165 Pa., 199. *Phelan vs. Moss*, 67 Pa., 59. *State Bank vs. McCoy*, 20 Pittsburg Journal, 5. 30. Where the maker of a negotiable note is induced, without negligence on his part, to sign it by fraudulent representation, that it is an instrument of an entirely different nature, the maker is not liable. *Mercur vs. Schwarkie*, 3 Lancaster Bar, No. 49. 3 Legal Opinion, 233. 31. The principle that the consideration of a promissory note cannot be inquired into in the case of a holder for value, does not apply to the case of such a paper made by a lunatic. *Moore vs. Hershey*, 90 Pa., 196. 32. The endorsee of an accommodation note may recover the whole amount of it from the maker, although he purchased it from the payee at a greater discount than six per cent. *Moore vs. Baird*, 30 Pa., 138. 33. A promissory note is void, where the consideration therefor is the promise of the payee that he will refrain from prosecuting the son of the maker for forgery. Such compounding of a crime is in itself a misdemeanor. *Oxford Bank vs. Kirk*, 90 Pa., 49. 34. The rule of evidence excluding a party to a negotiable instrument testifying against its validity, applies only to cases where it has been actually negotiated in the usual course of business.

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Parke vs. Smith, 4 W. & S., 287. 35. The general rule in regard to commercial paper is that the plaintiff is a *bona fide* holder, and the burden is on the defendant to show that he is not. When, however, the defendant has shown that the note was obtained or put into circulation by fraud or undue means, the maker may require proof of consideration. *Real Estate Investment Co. vs. Russell*, 148 Pa., 496. *Poultney vs. Bird*, 6 W. N., 486. 36. One who takes an accommodation note as collateral security for an antecedent debt, is not a holder for value, nor does he become so by renewing the note at maturity, no additional consideration being given for the renewed note. *Royer vs. Keystone Bank*, 83 Pa., 248. 37. Before the holder of negotiable paper can be required to prove his *bona fides*, it must appear either that the instrument was obtained originally, or was put in circulation subsequently, by fraud or undue means. Want or failure of consideration, or that an agent or broker to whom it was entrusted for negotiation had fraudulently misappropriated the proceeds of its discount, will not suffice for that purpose. The maker, by its negotiable form, authorizes the payee to put it in circulation. But where a man has lost or been robbed or defrauded of the note, he has a claim to protection against *mala fide* holders. *Sloan vs. Union Banking Co.*, 67 Pa., 472. 38. The original parties to commercial paper cannot by subsequent acts compromise the rights of endorsees. If the note was passed without consideration, or as security for an antecedent debt or endorsement, the holder occupies the same position as the payee. *Smith vs. Hogeland*, 78 Pa., 252. 39. In a suit against the endorser of a promissory note, an affidavit of defence is sufficient to prevent judgment, where it alleges facts to show that the endorsement was obtained by misrepresentation, and that the note was negotiated in fraud of his rights. *Smith vs. Loan Ass'n*, 93 Pa., 19. 40. In the absence of fraud, the maker of an accommodation note cannot set up want of consideration as a defence against a holder with notice to whom it has been pledged as collateral security for an antecedent debt by the

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payee. *Twining vs. Hunt*, 7 W. N., 223. 41. The maker of a non-negotiable note may defeat a recovery on it in the hands of a third party to whom it has been assigned for a valuable consideration, by setting up the want of consideration or any other equitable defence. *Wetter vs. Kiley*, 95 Pa., 461. 42. The equitable transferee of a non-negotiable note takes it subject to all the equities existing between the original parties at the time of the transfer. *White vs. Heylman*, 34 Pa., 142. 43. If a note be given for an entire consideration, part of which is legal and part illegal, the whole contract fails, and there can be no recovery, as between the original parties. *Yundt vs. Roberts*, 5 R., 138. *Frazier vs. Thompson*, 2 W. & S., 235.

XXXIII. NEGLECT OF DATE. Although any material alteration in a promissory note, after its endorsement, will invalidate it as to the endorser, yet if it be without date when endorsed, the law will imply that the endorser authorizes the filling in of the date, and such filling in by the maker will not relieve the endorser from liability. *Hepler vs. Savings Bank*, 97 Pa., 420.

XXXIV. NEGLECT OF DATE OF PAYMENT. Where no time for payment is mentioned in a note, the legal inference is that it is payable on demand, which may be rebutted by proof of a parol contemporaneous agreement fixing the time of payment. *Horner vs. Horner*, 145 Pa., 258.

XXXV. NEGLECT OF DEMAND FOR PAYMENT. 1. A waiver of protest by an endorser, even if it be not in writing, dispenses with the necessity of demanding payment of the maker or giving the endorser notice of non-payment. *Annaville Bank vs. Kettering*, 2 Chester Co., 109, 551. 2. To render the endorser of a note liable, demand must be made of the maker, if at a bank or place of business, within business hours; if at his residence, at a reasonable time. *Ashton vs. Dull*, 2 Foster, 64. 21 Pittsburgh Journal, 136. 3. The duty of demand and notice, in order to hold an endorser, is not a part of the contract, but a step in the legal remedy, and may be waived. Oral proof may be given

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of such waiver. *Barclay vs. Weaver*, 19 Pa., 401. 4. A presentment at the maker's usual place of business, during business hours, there being no one there to answer, is a sufficient demand to charge the endorser; for the maker is bound to have a suitable person there to answer inquiries, and pay his notes, if there demanded. But where a party has no place of business, or residence, or has removed, the nature of the inquiries made as to his whereabouts it seems should be set forth in the notarial certificate of protest. *Baumgardner vs. Reeves*, 35 Pa., 250. 5. In protesting a promissory note, the notary certified that during business hours he had called at the bank and found it closed; held, that this was sufficient demand to charge the endorsers. *Berg vs. Abbott*, 83 Pa., 177. 6. When a note is endorsed before it is due, the holder must present it for payment at maturity, and in case of default, must give immediate notice of the dishonor. But if endorsed after the note becomes due, it is payable whenever the holder demands it, and for this purpose, an action of law is a sufficient demand, as between the maker and holder. *Patterson vs. Todd*, 18 Pa., 431. *Bircleback vs. Wilkins*, 22 Pa., 28. 7. Where a note is payable at a bank, an assertion in the protest of demand at the bank is sufficient *prima facie* evidence of such demand. Proof of a delivery of such note by the cashier to the notary for protest on the last day of grace, and presentation by him at the bank on the day following suffices. *Brittain vs. Bank*, 5 W. & S., 87. 8. The fact that the maker of a promissory note resides in a different state from the place at which the note is dated, does not relieve the holder from the duty of demanding payment of the maker at his residence, and his neglect to do so, or to use due diligence to do so, discharges the endorser. *Browning vs. Armstrong*, 9 Phila., 59. 3 Legal Opinion, 343. 9. Demand at the place fixed for the payment of a note is not necessary in order to hold the maker. *Collins vs. Naylor*, 10 Phila., 437. *Paulous vs. McPherson*, 2 W. N., 172. 10. In an action against the drawer of a promissory note. proofs of demand, protest and notice are unnecessary. *Coon vs.*

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Caffrey, 6 Luzerne Register, 77. 11. It is a sufficient presentment, demand, and refusal of payment of a note, or a legal equivalent thereto, that it was in the banking house where it was made payable on the day it fell due, and that there were no funds of the maker there, nor other provision for payment. *Hallowell vs. Curry*, 41 Pa., 322. *Sherer vs. Eastern Bank*, 33 Pa., 134. 12. The holder of a note payable at a particular place, is under no obligation to demand payment of the maker at its maturity, nor does it release him by retaining the note at the request of the payee, upon his promise to pay it, without subjecting the holder to the trouble or cost of collecting it. The maker of the note might have discharged his liability, by depositing the amount of the note at the office where it was made payable. *Hocking Valley Bank vs. Barton*, 72 Pa., 114. 13. The cessation of mails and commercial intercourse with a blockaded city during a national war, is a sufficient excuse for the omission of demand for payment of a note upon a party in such city, while the impediment exists. *House vs. Adams*, 48 Pa., 261. 14. The holder of a note, to render the endorser liable, must demand payment of the note from the maker, or in his absence, from his clerk or agent on the last of the days of grace, and give due notice of the non-payment to the endorser. A demand on the maker before the last day of grace must pass for nothing. *Jackson vs. Newton*, 8 W., 401. *Bauman's Estate*, 5 Luzerne Law Times, 87. 9 Lancaster Bar, 55. *Beam vs. Grosch, Idem*, 69. 15. Where the maker of a note has absconded before the time of payment, it is not necessary to prove inquiry for him at his late residence, and an effort to obtain payment, in order to charge the endorser. Otherwise, when the maker has merely changed his residence. *Lehman vs. Jones*, 1 W. & S., 126. 16. The making and dating of a note at a particular place is not equivalent to making it payable there, nor does it supersede the necessity for presentment and demand at the residence or place of business of the maker if it be known, or if by due diligence in making inquiry it could be ascertained. *Oxnard*

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vs. *Varnum*, 111 Pa., 193. *Lightner* vs. *Will*, 2 W. & S., 140. 17. When a promissory note is payable at a particular place, such as a bank, and on a particular day, and the endorsee is there at the time to receive payment, no further demand on the drawer is necessary in order to charge the endorser. *Rahm* vs. *Bank*, 1 R., 335. *Bechtel* vs. *Miners' Bank*, 2 Phila., 121. 18. A notice, sent through the post office to the maker of a note is not such a demand as the law requires, when the maker's residence is known. The holder or his agent should call on the maker on the last day of grace, and present the note and demand payment. If this be not done, the maker remains responsible, but the endorser is discharged. The endorsee is bound to apply to the maker of the note, and must know who he is, and where he lives, unless the note is payable at a bank or some other specified place. Before suing the endorser, the holder must show a demand or due diligence to obtain the money from the maker. *Stuckert* vs. *Anderson*, 3 Wh., 118. 19. If a notary fail to demand payment by the maker of a promissory note owing to the holder failing to acquaint him with the address, and the endorser is thereby released, the notary public is not liable. *Vandewater* vs. *Williamson*, 6 W. N., 350.

XXXVI. NEGLECT OF ENDORSER. 1. The names of the payees of a note appeared on the back of a note in the proper position, while the defendant endorsed the paper at the remote end by inverting his name, instead of placing it under the name of the payees. Held, that this irregular endorsement did not relieve the defendant of liability, as he could have recourse against the payees. The fact that the defendant endorsed first in point of time, can have no influence, for presumably he knew that his endorsement would be nugatory, unless preceded by that of the payee. If, however, the payees had written their names in the same direction and immediately under the endorsement of the defendant, the inference would be plain that they did not intend that he should have recourse to them. *Arnot* vs. *Symonds*, 85 Pa., 99. 2. A bond of indem-

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nity given to an accommodation endorser conditioned upon the payment of certain notes, does not cover renewals. When a new note was received for the old one, the latter thereby became extinguished. *Mount Pleasant Bank's Appeal*, 82 Pa., 488. 3. Where the endorsement of a note is not in the usual form, as a note to Susanna A. Prah, endorsed Mrs. Prah, it is irregular, and the title must be established by evidence before a jury. Plaintiff is not entitled to judgment for want of an affidavit of defence. *Prah vs. Smaltz*, 6 W. N., 571. 4. Where a party signs a note on its face and under the name of the maker, and attaches the word "endorser" to his name, it is an irregular endorsement. *Schwenk vs. Yost*, 9 W. N., 16. 5. The rule that an addition to the signature of an endorser to a promissory note, *e. g.*, "President," will not exempt the endorsee from individual liability, does not extend to a case where the note remains in the hands of the original endorsee, who took it in payment of a debt due by the company of which the endorser was president, and with full knowledge that the endorsement was intended to be the contract of the company. *Seyfert vs. Lowe*, 7 W. N., 39. 6. The holder of a negotiable note by an agreement with the maker, for valuable consideration, extended the time for its payment, and afterwards endorsed the same to a third person without notice of such agreement. Held, that he was liable to the endorsee, without demand of payment from the maker, protest or notice. *Williams vs. Brobst*, 10 W., 111.

XXXVII. NEGLECT OF HOLDER. 1. In a question between the holder and the endorser of a note, as to the exoneration of the latter by the negligence of the holder, the endorser cannot give evidence of the ability of the maker at a time when the holder had not the power to enforce payment. *Bank of Penna. vs. Reed*, 1 W. & S., 101. 2. It is a rule, that an extension of time by a valid agreement between the creditor and the principal will, as a general rule, discharge the endorser. But a discharge of the debtor by the creditor will not discharge the surety, if there be an

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agreement between the creditor and the debtor that the surety shall not be discharged. Hence, if an agreement by the holder of a note with the maker for delay expressly reserves the rights of the holder in the intermediate time against the endorser, it will not discharge the latter. *Hagey vs. Hill*, 75 Pa., 111. 3. Payment of a promissory note by the maker before maturity does not extinguish it as against a *bona fide* holder without notice. *Runyan vs. Reed*, 5 Clark, 439. 4. The endorser of a protected note cannot call upon the holder to sue the maker and if he refuses, relieve himself from liability. It is his duty to take it up and bring suit himself. *Beebe vs. Bank*, 7 W. & S., 375. *McCamant vs. Trust Co.*, 15 W. N., 124.

XXXVIII. NEGLECT OF LEGAL CONSIDERATION. 1. A promissory note given to the prosecutor to stifle a prosecution for felony is void, but in the case of the settlement of certain misdemeanors which may lawfully be settled by the parties themselves, such note given therefor would be good. *Geier vs. Shade*, 109 Pa., 180. 2. A promissory note, given in a gambling transaction is void; although negotiable in form, and in the hands of an innocent holder for value. *Harper vs. Young*, 112 Pa., 419. 3. A note is not invalid, because given in the settlement before a committing magistrate of a criminal prosecution for obtaining goods by means of false pretences, such settlement being authorized by the act of March 31, 1860. *Rothermal vs. Hughes*, 134 Pa., 510. 4. Promissory notes given as a margin to cover a rise or a fall in the price of stocks not actually paid for and delivered, are the instruments of a wager, and cannot be recovered. *Swartz's Appeal*, 3 Brewster, 131. *Fareira vs. Gabell*, 6 W. N., 490. *Gaw vs. Bennett*, 153 Pa., 247. 5. An obligation given in compromise of a felony is void. But as regards misdemeanors, there is some conflict among the decisions, some of them holding that while the compromise of some misdemeanors would be an unlawful consideration for a contract, it would be otherwise as respects some others of less infamy. *Watson vs. Supplee*, 15 W. N., 91. 6. A promissory note given by a

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parent to stifle a criminal prosecution against a son, and not in direct settlement and discharge of the debt, is not recoverable by suit. *Watson vs. Supplee*, Montgomery Co. Law Reporter, 1885.

- XXXIX. NEGLIGENCE ON THE PART OF THE MAKER. 1. The maker of a negotiable note undertakes to pay it, according to its tenor, to any holder to whom it may be due. An accommodation maker is equally liable, except to the payee. The maker has placed himself in the situation of a principal, and shall not escape by alleging he was a surety. The fact that the holder knew he had received no value would make no difference. So is an accommodation endorser liable to subsequent endorsees. *Stephens vs. Bank*, 88 Pa., 127. 2. The total drunkenness of the maker when he executes a note, if known to the payee, makes it void as to him. On grounds of public policy, the defence of drunkenness in the maker cannot be set up against the innocent holder of a negotiable note. *State Bank vs. McCoy*, 69 Pa., 204.

XL. NEGLIGENCE OF NAME OF PAYEE. Notes executed, leaving the name of the payee blank, are payable to bearer. Any *bona fide* holder may sue upon them. *Winton vs. Collings*, 4 Kulp, 491.

XLI. NEGLIGENCE OF NEGOTIABILITY. 1. A holder of a promissory note cannot hold the endorser unless the note has been rendered negotiable by the insertion of the words, "or order." *Bell vs. Sterling*, 12 Phila., 230. 2. On the face of a note was written: "The endorsers hereon contract as makers hereof and waive protest and demand, and notice of non-payment, and agree as to the holder thereof, to be held liable as original makers." Held, that the note was negotiable. *Chambersburg Bank vs. Schall*, 5 York Record, 2. 3. A promissory note containing a provision to pay attorney's commissions, the amount being left in blank, if collected by legal process is not negotiable. It is a necessary quality of negotiable paper, that it should be simple, certain, unconditional, not subject to any contingency. A note with a part thus in blank

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does not meet these conditions. *Johnston vs. Speer*, 92 Pa., 227. 4. A promissory note with warrant to confess judgment, is not negotiable paper. It is liable in the hands of a holder to any set-off existing against the payee. *McCorkle vs. Davis*, 1 Chester Co., 30. *Baker vs. Nipple*, 16 Pa. County, 659. *Draper vs. Sharp*, 1 Pittsburg, 473. 5. A clause in a promissory note allowing a commission as a collection fee in case of non-payment at maturity, renders the note uncertain and destroys its negotiability. *Nicholson vs. Bank*, 4 W. N., 441. *Johnston vs. Speer*, 28 Pittsburg Journal, 87. *Woods vs. North*, 84 Pa., 407. 6. It is settled, that any language put upon any portion of the face or back of a promissory note by the maker before delivery, is part of the contract, and if thereby the payment of it is not necessarily to be made, at all events and of the full sum, in lawful money, and at a time certain to arrive, and subject to no contingency, the note is not negotiable. It is a necessary quality of negotiable paper, that it should be simple, certain, unconditional, not subject to any contingency. *Woods vs. North*, 84 Pa., 207. *Iron City Bank vs. McCord*, 139 Pa., 59. *Bryan vs. Bryan*, 2 W. N., 479. *Farquhar vs. Trust Co.*, 26 Pittsburg Journal, 43. 13 Phila., 473. 7. A clause in a promissory note, stating that it is accompanied with collateral security, does not destroy its negotiability. *Valley Bank vs. Crowell*, 148 Pa., 284. 8. A note containing waiver of appeal, valuation and appraisement, stay of execution and exemption, is nevertheless negotiable. *Zimmerman vs. Rote*, 20 Pittsburg Journal, 68.

XLII. NEGLECT OF NOTICE OF DEMAND. Where an endorser admits his liability at the time of the maturity of the note, and offers to arrange the matter with the holders, and thereafter shows by his conduct he regards himself liable, and asks for indulgence, these acts amount to a waiver of notice of demand and dishonor. *Moyer's Appeal*, 87 Pa., 129.

XLIII. NEGLECT OF NOTICE OF FRAUD. In an action by the endorsee of a promissory note against one of two makers, where the defence is that it was fraudulently made and cir-

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culated, the plaintiff need not prove that he was a *bona fide* holder, unless he have notice previous to the trial, that such proof will be required of him. A special plea, setting forth such defence, is notice under this rule, and possibly an affidavit of defence to the same effect would suffice, if offered in evidence as notice. *Albiets vs. Mellon*, 37 Pa., 367.

XLIV. NEGLECT OF NOTICE OF NON-PAYMENT. 1. When a note is dishonored by the maker, the endorser is not liable for its payment, if the holder neglects to give him due notice of non-payment. In England, the rule is positive, that the notice must be given on the next day, if the parties live in the same place, and by the next post, if they live in different places. But in Pennsylvania, what is due notice is a matter of fact for the jury in each case. It is immaterial that the maker is insolvent. *Ball vs. Dennison*, 4 D., 162. *Bank vs. Pettit, Idem*, 127. *Bank vs. McKnight*, 1 Y., 145. 2. The death or insolvency of the drawer of a note before its maturity, does not dispense with the necessity of notice to the endorsers of non-payment by the maker. Even a verdict does not cure the omission. Though the drawer may impliedly waive his right of defence, founded on the laches of the holder, yet an endorser can only do so by an express waiver. *Bank vs. Hale*, 16 S. & R., 157. 3. A bank which receives a note for collection, and when it is overdue places it in the hands of a notary in the usual course, is not liable for the neglect of the notary to give notice to an endorser. Even the notary would be excused, if it appeared that in the absence of specific instructions he had pursued the usual course. Neither the notary nor the bank is bound to know any one in the transaction but the last endorser. *Bellemire vs. U. S. Bank*, 4 Wh., 105. 4. The liability of an endorser is strictly conditional, dependent upon due demand for payment upon the maker of the note, and also due notice of the non-payment. The demand and notice are conditions precedent to the endorser's liability, and the holder must use reasonable diligence in giving notice of the dishonor of the note. What amounts to due diligence

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or reasonable notice is a question of law for the court. *Cassidy vs. Kreamer*, 22 W. N., 109. *Banking Co. vs. Wolf*, 3 W. N., 93. 5. Immediate notice of non-payment of a note is quite as important to the endorser as a demand upon the maker. Both are necessary in order to charge the endorser. The dating of a promissory note at a particular place does not make that the place of payment. Often the place of payment is specified in the body of the note. *Browning vs. Armstrong*, 9 Phila., 61. *Bank vs. Williams*, 1 W. N., 284. *Collins vs. Bank, Idem*, 48. *Anderson vs. Pastorius, Idem*, 63. *Hopkins vs. Todd, Idem*, 95. 6. Although the general rule is, that notice of dishonor of a note should be given the day after it is received, where the parties live at the same place, or by the next practicable mail, if the parties live at different post offices, and should be given at the residence or place of business of the person entitled to receive it, yet actual notice, wherever received, is good. *Dicken vs. Hall*, 87 Pa., 379. 7. It is enough, that the drawer or endorser receive notice in as many days as there are subsequent endorsers: unless it be shown that each endorsee gave notice within a day after receiving it; as if any one had been beyond the day, the prior endorsers are discharged; in other words, there shall not be a longer link in the chain than the space of a single day. A notice dated on the second day of grace, will not bind the endorser. *Etting vs. Bank*, 2 Pa., 255. *Stephenson vs. Dickson*, 24 Pa., 152. 8. Where a note fell due on Saturday, and the residence of the holders and endorser and the place of payment were all in the same city, notice of non-payment might have been given to the endorser personally, or, if written, left at his dwelling or place of business on that day or Monday. *Hallowell vs. Curry*, 41 Pa., 322. 9. The notary's protest of a promissory note is *prima facie* evidence of the fact of notice to the endorser of non-payment, when recited in it; and such notice suffices, if duly sent, even if not received by the endorser. *Jenks vs. Bank*, 4 W. & S., 505. *Landis vs. Marker*, 2 Delaware Co., 473. 10. The

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rule is, that notice must be served on the endorser personally, or left at his dwelling or place of business. The exception is, that it may be transmitted through the post office, when there is a strong probability that it will reach him in the regular course of the mail, and where such endorser lives in a different town than the one in which the holder resides. If he lives in the same town, notice must not be sent through the post office. *Jones vs. Lewis*, 8 W. & S., 14. *Kramer vs. McDowell*, *Idem*, 138.

11. An endorser is entitled to notice of non-payment, even though he has received from the drawer collateral security to indemnify him against his endorsement. There can be no presumptive waiver of notice, where there has been no waiver of recourse to the maker. *Kramer vs. Sandford*, 4 W. & S., 328.

12. The insolvency of the drawer of a promissory note, does not dispense with the necessity of a demand for payment, and notice to the endorser. As between the parties to the note, the rule is inflexible and open to no inquiry, whether notice would have availed the endorser. But this notice is not necessary to charge guarantees of the note, who virtually insure the solvency of the principal. Hence, in such case, if he be insolvent or bankrupt, it is nugatory to make a demand upon him. *Gibbs vs. Cannon*, 9 S. & R., 200. *Leech vs. Hill*, 4 W., 448.

13. If a note be endorsed by the payee, it is an undertaking by him to pay the amount at the time appointed, if the maker do not; provided the holder makes a demand on the maker, and gives due notice to the endorser on default of payment. But when a note is drawn and endorsed out of the usual form, it is an anomalous instrument, and is not negotiable. If the maker of such an agreement be notoriously insolvent, notice of non-payment is not requisite. *Leech vs. Hill*, 4 W., 448.

14. In case the death of an endorser before the maturity of the note be unknown to the holder, or, if known, yet no personal representatives of the decedent exist, it is sufficient, in order to charge his estate, to direct notice of the non-payment to the deceased endorser, by

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name, at the post office nearest his last place of residence. *Linderman vs. Guldin*, 34 Pa., 54. 15. An acknowledgment of liability and a promise to pay, made by an endorser, after default of payment by the maker, dispenses with proof of presentment and notice, and throws on the defendant the double burden of proving laches, and that he was ignorant of it. *Loose vs. Loose*, 36 Pa., 538. 16. In an action against the endorser of a promissory note, he denied in his affidavit of defence that he had received any notice of non-payment. This sufficed to send the case to a jury. *McPherson vs. Bank*, 96 Pa., 135. 17. If a note falls due on Friday, and notice of non-payment is not received till the following Monday, it is too late, if the parties live in the same town; but an affidavit of defence in such case should state where the maker resided, which residence should be known to the endorser. *Moore vs. Somerset*, 6 W. & S., 262. 18. A notice of non-payment, sent to the endorser, enclosed under seal, and delivered by messenger to one in the employment of the endorser, with directions not to open it, is insufficient. *Paine vs. Edsell*, 19 Pa., 178. 19. Verbal notice to the endorser of non-payment by the drawer is sufficient. All that is requisite is that he shall receive notice in time, that will inform him of the default of the maker. *Rahm vs. Bank*, 1 R., 335. 20. In proving notice to an endorser of demand and refusal, which was sent by mail, it should be distinctly proved where the notice was sent and by whom. *Shoneman vs. Fegley*, 14 Pa., 376. 21. A subsequent promise to pay the note by an endorser, who has full knowledge of the facts, or a part payment by him, amounts to a complete waiver of the want of due notice. *Sherer vs. Easton Bank*, 33 Pa., 141. 22. If notice to the endorser of non-payment of a note be left at the post office of the town or city in which the endorser lives, in time to go by the letter carrier on the same day to the party, it will be deemed sufficient. *Shoemaker vs. Bank*, 59 Pa., 79. 23. It is sufficient proof of the delivery of a notice, to show that it was sent in a letter by the post, without proving that the letter was

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received, provided it was sent in time. The presumption is that it reaches its destination in due time, and this is all the law requires. Where a duplicate original or copy of the notice has been kept, it is good evidence without a notice to produce it. Where no copy has been retained, parol evidence of the contents of the notice may be given, without a notice to produce the original. *Smyth vs. Hawthorn*, 3 R., 358. 24. The endorser only undertakes, in case the maker does not pay. Notice must be promptly given the endorser of such non-payment. The rule is, that if the endorser live in a different post town than that of the holder, a notice to the endorser through the post office is good. There should be due diligence on the part of the holder in obtaining the correct address of the endorser. *Stuckert vs. Anderson*, 3 Wh., 118. *Felsmeyer vs. Ebert*, 16 W. N., 254. 25. Where one endorses an overdue note, he is entitled within reasonable time to notice of demand and non-payment, as much as if it had been endorsed before maturity. *Tyler vs. Young*, 30 Pa., 143.

XLV. NEGLECT OF NOTICE OF PROTEST. 1. Under the acts of April 5, 1849, and of April 8, 1851, where the endorser's residence or place of business is not added to his endorsement, a protest made at any time before suit brought, is receivable in evidence against him, and such endorser is not discharged by the omission to give notice of non-payment at the maturity of the note. *Ashton vs. Sproule*, 35 Pa., 492. 2. It is not sufficient in an affidavit of defence, for an endorser to say that he had not received notice of protest. He must state facts that will justify the inference that no notice was given or due diligence used. *Brancher vs. Beltz*, 2 Schuylkill Record, 394. *Miller vs. Vandike*, 13 W. N., 281. 3. Actual notice of protest of a note, even if not made by a notary public, is sufficient to charge the endorser. Notice of protest to one partner binds all. *Cake vs. Stidfole*, 1 Walker, 95. *Collins vs. Bank*, *Idem*, 194. 4. Notice of protest having been left with a person on Sunday, with information of its nature, and the following day being in time to serve said notice,

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held, that it was sufficient. *Carlisle Bank vs. Rheem*, 1 Foster, 262. 10 Phila., 462. *Contra*, 76 Pa., 132. 5. A waiver by an endorser of notice of protest, puts the endorser in the same position as if the protest had been made and notice of it given him. He has no right to require the holder to sue the drawer, under penalty of the endorser being discharged in case of non-compliance. It is his duty to take up the note. *Day vs. Ridgway*, 17 Pa., 303. 6. Notice to an endorser who is temporarily absent from home, sent to him by mail where he is stopping, without any direction to so send it, is good notice to him, if he actually receives it as soon as he would have had it been left at his residence. Notice of protest is good if sent by mail to the residence of an endorser who lives in an adjoining township, even though it be less than a mile from the bank. *Hall vs. Dicken*, 25 *Pittsburg Journal*, 184. *Stimple vs. Herman*, *Idem*, 15. 7. When notice of protest is sent to a post office not the nearest to the endorser's place of residence, the question of diligence is a question of fact for a jury. *Kennedy vs. Davis*, 1 Delaware County, 313. 8. A hotel in a town where the endorser of a note frequently stops, is not a place at which notice of protest and non-payment of a note should be left by the notary. In such case, a notice by mail to his nearest post office address suffices to charge him as endorser. *Kerr vs. Roberts*, 5 W. N., 25. 9. Notice of protest must be served personally or left at the house or place of business of the party sought to be charged, where the party lives in the same city. It must be left within a reasonable time. What is reasonable notice is a mixed question of law and fact. *Kramer vs. McDowell*, 8 W. & S., 138. *Government Bank vs. Shepherd*, 1 *Schuylkill Record*, 52. 10. Notice of protest for non-payment of a promissory note, personally delivered on the proper day, is not vitiated by being post-dated the next day, the mistake being one which could not have misled the endorser. *Lennig vs. Tobey*, 4 Clark, 275. Brightley's Rep., 482. *Tobey vs. Lennig*, 14 Pa., 483. 11. Notice of protest

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served upon the second day after dishonor, is in time when there is an intermediate holder for collection only. *Myers vs. Courtney*, 11 **Phila.**, 343. 12. Delivery of a letter duly stamped to a United States letter carrier, while on his rounds, is a legal mailing thereof. Where such envelope, properly directed and stamped, enclosed a notice of protest to the endorser, it was a legal mailing to charge the endorser, though he denied receipt of the notice. *Pearce vs. Langfit*, 101 **Pa.**, 507. 13. Service of notice of the protest of a note made upon the endorser on Sunday is unlawful, and his receiving it in silence is no waiver of the irregularity. *Rheem vs. Carlisle Bank*, 76 **Pa.**, 132. 14. A notice of protest sent through the medium of the post office is sufficient to charge the endorser, but such fact must be positively proved. *Weakley vs. Bell*, 9 **W.**, 273. *Schoneman vs. Fegley*, 7 **Pa.**, 438. 15. The notice of protest to be given to one who resides in the same city must be served personally, or by leaving it at the party's house or place of business; depositing it in the post office, directed to him, is not sufficient. But when they reside in different places, a notice of protest sent by mail and directed to the endorser at the nearest post office, is sufficient, and, if properly directed, is good, although it miscarry. When a notary is employed, it is the duty of the holder to inform him of the endorser's place of residence, and to use diligence in discovering such residence. *Haly vs. Brown*, 5 **Pa.**, 181. *Mercer vs. Lancaster*, **Idem**, 160. *Smith vs. Fisher*, 24 **Pa.**, 222. *Barnes vs. Caldwell*, 1 **Luzerne Register**, 72. 3 **Pittsburg**, 336. *Gordon vs. Pedrick*, 6 **Phila.**, 254. 16. Such notice ought to be given in a reasonable time, as want of notice is tantamount to payment. *Steinmetz vs. Curry*, 1 **D.**, 234, 270. 17. If an endorser reside beyond the limits of the city or town where a note endorsed by him is protested for non-payment, the notice may be sent to the post office nearest his place of residence; and this will be sufficient, whether he receives it or not. Where such notice was sent to a more remote office, where the endorser was not accustomed to

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receive his letters, it was insufficient. *Woods vs. Neeld*, 44 Pa., 86. 18. A presentment of a promissory note on the last day of grace, and a refusal to pay, with notice to the endorser on the same day after three o'clock, renders the endorser liable. *Coleman vs. Carpenter*, 9 Pa., 178.

XLVI. NEGLECT OF NOTICE TO SHOW TITLE. In an action on a promissory note, where the defendant seeks to overthrow the presumption that the plaintiff obtained it in good faith and in the regular course of business before maturity, he must give the plaintiff distinct notice to show title. It is not sufficient merely to give notice of want of consideration, or that the note was negotiated contrary to the agreement of the parties. *Hey vs. Frazier*, 1 Monaghan, 759.

XLVII. NEGLECT OF OWNERSHIP. 1. A general allegation in an affidavit of defence, that the defendant is not the real owner and holder of the note in suit, but simply an agent for the collection of the same, is insufficient. The averment must detail the reasons for such belief. *Hagerstown Bank vs. Soltenberger*, 1 Lancaster Review, 75. 2 Delaware Co., 57. 2. An affidavit of defence in a suit on a promissory note is sufficient, which avers that the deponent believes and expects to be able to prove that the plaintiff is not a *bona fide* holder for value and without notice before maturity of the note, and is being used as plaintiff to prevent a defence to the said note being established. *Penn Bank vs. Mfg. Co.*, 15 Pa. County, 320.

XLVIII. NEGLECT OF PAYMENT. The last endorser of a negotiable note, having possession of it, has a right of action against the maker and any of the prior endorsers, without recourse to the payee. *Mullen vs. French*, 9 W., 96.

XLIX. NEGLECT OF PRESENTMENT. The removal of the maker and endorser of a promissory note into another jurisdiction, after the execution of the instrument, will not dispense with the necessity of presentment and notice of non-payment. *Becker vs. Levy*, 5 Clark, 298.

L. NEGLECT OF PROMPT NOTICE OF FORGERY. Notice of the forgery within a reasonable time after its discovery, and

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an offer to return the note, are necessary to the maintenance of an action for the recovery of the consideration paid, unless the note be shown to possess no value. *Rick vs. Kelly*, 30 Pa., 527.

LI. NEGLECT OF PROOF OF NOTICE. It seems, that in the case of a protest of a foreign bill in a foreign country, there is no necessity to prove the signature of the notary. There are cases where notice is not necessary. Giving notice of protest is a notarial act, and yet it has been said, that giving such notice is no part of a notary's duty. A certificate by the notary that notice was sent, is no sufficient evidence of it. The notary is usually called into court to prove the notice. *Filler vs. Morris*, 6 Wh., 414.

LII. NEGLECT OF PROTEST. 1. Protest of a note may be waived either by a writing or by parol. A waiver of protest of a note by an endorser before maturity, releases the holder from the necessity of making demand and of notifying the endorser of non-payment. *Annvile Bank vs. Kettering*, 106 Pa., 531. *Huckenstein vs. Hermann*, 24 Pittsburg Journal, 186. 1 Walker, 92. *Arnold vs. Niess*, *Idem*, 115. 2. Notarial protest of a promissory note for non-payment is not necessary; it is only important as *prima facie* evidence of demand on the maker, and notice to the endorsers. The maker of a note not endorsed is not liable for the cost of protest. *Falk vs. Lee*, 8 W. N., 345. 1 Kulp, 203. 12 Lancaster Bar, 55. *Martin vs. Wilhelm*, 1 W. N., 105, 389. *Pearce vs. Austin*, 4 W. N., 489. 3. The offer of a renewal note with the same makers and endorsers as the original note, prior to the maturity of the said note, constitutes a waiver of protest. The endorsers did not expect the original note in such case to be paid at maturity. *Jenkins vs. White*, 147 Pa., 303. 4. The waiver of protest by an endorser on the day of the maturity of the note, and is *prima facie* proof of demand and refusal, and of notice. *Scott vs. Greer*, 10 Pa., 103.

LIII. NEGLECT OF WORDS "GIVEN FOR A PATENT RIGHT."

1. When a promissory note is given for a patent right, and the

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words required by the act of April 12, 1872, are not written or printed thereon, such note is void as between the original parties. *Bowen vs. Kemmerer*, 2 Pearson, 250. 5 Luzerne Register, 104. 2. Where the consideration of a note was the right to use and vend a patented invention, and the note had not on its face the words, "given for a patent right," required by the act of April 12, 1872, and the endorsee knew that it was given for a patented invention, he is not a *bona fide* holder, and the note in his hands is subject to any defences that exist against the payee. *Weaver vs. Frantz*, 1 Pennypacker, 153. 3. The act of April 12, 1872, concerning patent right notes, applies only to negotiable promissory notes. *Gray vs. Mortimer*, 7 Pa. County, 671. 4. The act of April 12, 1872, requires, that any promissory note or other negotiable instrument, the consideration for which shall consist in whole or in part of the right to make, use or sell a patented article, shall have the words, "given for a patent right," prominently and legibly written on the face of such note. A breach of this law is a misdemeanor. *Shires vs. Commonwealth*, 22 W. N., 16. 120 Pa., 368.

LIV. NEGLECT TO ALLOW DAYS OF GRACE. An endorser on a promissory note cannot be sued before the full expiration of the last day of grace, although the note had been protested for non-payment at the close of the usual bank hours, before the writ was issued. *Bevan vs. Eldridge*, 2 Miles, 353.

LV. NEGLECT TO DEMAND PAYMENT. 1. If the maker of a note is not to be found when the note becomes due, a demand on him for payment is not necessary in order to charge the endorser. But it is requisite in such case, that due diligence was employed to make the demand. It is not incumbent on the endorser to show the holder where the maker can be found. *Duncan vs. McCullough*, 4 S. & R., 480. 2. If the maker of a note remove from his usual place of residence to another in the same state, the holder must make reasonable effort to trace him, and present the note for payment. This is not necessary, if he has absconded. *Reid vs. Morrison*, 2

Promissory Notes—Continued.

W. & S., 401. 3. An agreement before maturity by an endorser to waive notice of the dishonor of a note not made payable at any particular place, is no excuse for want of due presentation to the maker for payment. *Savage vs. Bell*, 1 Woodward's Decisions, 52. 4. If the holder of a note knew at the time it was discounted, that it was drawn for the accommodation of the endorser, and give time to the endorser, without consulting the drawer, the latter is not discharged thereby. It was the drawer's business to ask if it had been paid, if he desired information. *Walker vs. Bank*, 12 S. & R., 382. 5. No presumption of the payment of a note under seal arises from the mere neglect by the payee to make a demand for payment during his lifetime. Such neglect, however, may be considered by the jury, along with other facts in the case, in determining the presumption of payment. *Walls vs. Walls*, 170 Pa., 49. 6. As to the maker of a note, there is no obligation on the part of the holder to present it and demand payment of him within a reasonable time. *Williamsport Gas Co. vs. Pinkerton*, 95 Pa., 64.

LVI. NEGLECT TO ENDORSE. 1. A note payable to the joint order of several persons, must be endorsed by each to pass title. It is then a joint endorsement, suit on which is properly brought against them jointly, and there can be no recovery against one singly. *Foster vs. Collner*, 32 **Pittsburg Journal**, 281. 2. A negotiable note, payable to the order of the plaintiff, need not be endorsed by him before suit brought. *Huling vs. Hurg*, 1 **W. & S.**, 418.

LVII. NEGLECT TO EXECUTE. An affidavit of defence, that to the best of affiant's knowledge and belief, he never signed the note in suit, nor had knowledge of it, is evasive and insufficient. He should demand inspection of the original, and then deny that it was signed by him or by his authority. *Allen vs. Bank*, 10 **W. N.**, 188.

LVIII. NEGLECT TO FILL BLANK SPACES. Where a man delivers a note signed, with blanks left in it, he makes the person to whom he delivers it his agent to fill the blanks.

Promissory Notes—Continued.

Fetherolf vs. Betz, 10 Luzerne Register, 148. *Fetherolf vs. Kimmel*, 2 Schuylkill Record, 104.

LIX. NEGLECT TO GIVE NOTICE OF NON-PAYMENT. The death of the maker of a promissory note before maturity, and the granting of letters testamentary to the endorser, does not dispense with the necessity of giving notice of non-payment to the endorser; who in default of such notice is discharged from all personal liability. *Groth vs. Gyger*, 31 Pa., 271.

LX. NEGLECT TO NOTICE ENDORSEMENT. An irregular endorsement of a note will affect a purchaser with notice of the equities of the parties and should put him on inquiry. It is only when the endorsement of a note is irregular, and parol evidence is necessary to give the irregular endorsement effect, that the statute applies, which requires a promise to pay the debt of another to be in writing. *Losee vs. Bissell*, 22 **Pittsburg Journal**, 100. *Shaffer vs. Bank, Idem*, 114.

LXI. NEGLECT TO PAY. 1. The makers of a note are not discharged from liability by its presentment at bank, where there are sufficient funds to meet it when due, if by mistake of the bank officers, payment is refused and the note protested for non-payment. *Hecksher vs. Shoemaker*, 47 Pa., 249. 2. When a note passes after maturity, it is dishonored paper and the endorsee takes it subject to equities connected with the note; but not to set off generally. *Long vs. Rhawn*, 75 Pa., 128.

LXII. NEGLECT TO PAY COSTS OF PROTEST. The maker of a promissory note, not endorsed, is not liable to the costs of protest. *Gibb vs. Geiss*, 5 W. N., 148.

LXIII. NEGLECT TO PRESS PAYMENT. 1. Where the holder of a note accepts from the maker on the day it becomes due, and in full satisfaction thereof, if paid, a check, post-dated six days, it was held, that this was a suspension of the remedy against the maker, and discharged the endorser. *Okie vs. Spencer*, 2 Wh., 253. 1 Miles, 299. 2. Where the holder of a note agrees with the maker to accept the amount in small payments, the endorser is not thereby discharged. *Patterson vs.*

Promissory Notes—Continued.

Grier, 1 **Pittsburg**, 139. 3. An indefinite extension of time for payment of promissory note granted by the holder to the maker, does not release the endorser. The endorser, by taking up the note, could sue the maker immediately. *Aliter*, if such extension were for a definite time. *People's Bank vs. Legrand*, 103 **Pa.**, 309. 4. The holder of a promissory note, the payment of which has been guaranteed by the payee at the time of the assignment, must use due diligence to recover from the maker of the note, in order to hold the guarantor liable. *Tissue vs. Hanna*, 158 **Pa.**, 384.

LXIV. NEGLECT TO PRODUCE AT THE TRIAL. 1. Judgment may be entered in favor of plaintiff in a suit on a promissory note, though the note be lost. In such case, the court will protect the defendant, either by restraining the execution until he is sufficiently indemnified by plaintiff, or until he is protected by the bar of the statute of limitations. *Reisinger vs. Magee*, 158 **Pa.**, 280. 2. To entitle a party to recover on a lost promissory note, the genuineness of the original must be positive. *Slone vs. Thomas*, 12 **Pa.**, 209.

LXV. NEGLECT TO PROPERLY ENDORSE. Where a third party endorses a promissory note before the payee, he is neither liable to the payee or to a bank which discounted the note for the payee, without evidence *dehors* that he had assumed the liability. Such an endorsement is irregular. *Schafer vs. Farmers & Mech. Bank*, 59 **Pa.**, 144. *Murray vs. McKee*, 60 **Pa.**, 85.

LXVI. NEGLECT TO PROTEST. 1. A protest is not essentially necessary to enable the endorsee of a note to recover; but is indispensably requisite in the case of a foreign bill of exchange. It is sufficient, if the endorser receive notice, in a reasonable time, of the non-payment of the note by the drawer. *Rahm vs. Bank*, 1 **R.**, 337. 2. Strictly a waiver of protest is an agreement made before or at the time of maturity of a note, and a promise to pay made after maturity, notwithstanding there had been no protest, is a new undertaking. But the undertaking is still primary on the part of

Promissory Notes—Continued.

an endorser, and not a mere promise to pay the debt of another. The endorser is liable on such promise. *Uhler vs. Farmers' Bank*, 64 Pa., 469.

LXVII. NEGLECT TO PROVE DEMAND. In a suit upon a note, the plaintiff is bound to prove demand upon the maker, but need not prove the handwriting of the endorser. *Roop vs. Brubacker*, 1 R., 309.

LXVIII. NEGLECT TO READ. That the maker of a note cannot read the language in which it is written is a fact to be considered; still the burden is on him to prove that it was falsely read or misrepresented. *Knarr vs. Elgren*, 35 *Pittsburg Journal*, 77.

LXIX. NEGLECT TO RENEW. 1. Parol evidence of an agreement when the note was made, that it should be renewed at maturity, would contradict the written contract of the parties, and is therefore inadmissible. *Anspach vs. Best*, 52 Pa., 356. 2. A parol agreement to renew a promissory note, and not to negotiate the same, is no defence to an action thereon. *Philler vs. Esler*, 29 W. N., 258.

LXX. NEGLECT TO SPECIFY PLACE OR TIME OF PAYMENT. 1. A promissory note, not made payable by express stipulation at any particular place, is payable at the place where made, and is governed by the law of that place as to the rate of interest. *Clark vs. Searight*, 138 Pa., 173. 2. In the absence of a named place for payment, a note is payable at the maker's residence or place of business, where presentment must be made in order to hold endorsers. *Oxnard vs. Varnim*, 33 *Pittsburg Journal*, 346. 3. Where a promissory note was made payable "at my convenience whenever I have funds in my hands to pay the same," and the maker testified that it was not convenient for her to pay it, and never had been so, it was held that the payee could not recover. *Kreiter vs. Miller*, 1 *Pennypacker*, 46.

LXXI. NEGLECT TO SUE. 1. Delay in suing either the maker or endorser on a promissory note, will not discharge the endorser, provided no time was given till after the note

Promissory Notes—Continued.

was protested. If the original time of payment had been enlarged without the consent of the endorser, he would have been discharged. But the money having been demanded, the note protested, and notice given to the endorser, the holder of the note may delay as long as he pleases, without injuring his security. By the notice to the endorser, he knows that nothing but payment will discharge him. The holder may sue all the endorsers, or any of them. *Sterling vs. Trading Co.*, 11 S. & R., 179. 2. The endorser of a protested note cannot call upon the holder to sue the drawer, and if he refuse, thereby release himself; it is his duty to take it up if he desires suit to be instituted against the maker. *Pottsville Bank vs. Moyer*, 1 Schuylkill Record, 75.

Prosecution.

I. NEGLECT BY COMPROMISING. 1. While an agreement made in consideration of stifling a prosecution for a felony is void, yet certain misdemeanors which chiefly affect the persons aggrieved and not the public interests, do not come within the rule, and may be settled by private agreement. *Gcier vs. Shade*, 109 Pa., 180. 2. An offence for which the injured party might recover damages in a civil action, although it be also made the subject of a criminal prosecution, may be compromised. But if it be of a public nature, an agreement upon the condition of stifling a prosecution of it cannot be enforced. *Kearney vs. Smith*, 2 Luzerne Register, 170. 3. The stifling of a prosecution for a criminal offence, even where it is a mere misdemeanor, and within the control of the parties, is not a proper subject of a bargain for a fee. This is especially the case, where the crime is one which concerns the public morals. *Ormerod vs. Dearman*, 100 Pa., 563.

II. NEGLECT IN INSTITUTING. 1. That the defendant, before instituting the prosecution, consulted a special detective officer deputed by the mayor, and by his advice caused the plaintiff's arrest, is no justification. *Brietnicsser vs. Stier*, 9 W. N., 112. 13 Philada., 80. 2. In an action for malicious

Prosecution—Continued.

prosecution, the defendant cannot be permitted to prove that he acted under the advice of a magistrate. When, however, a prosecutor fully and fairly submits to his counsel, learned in the law, all the facts which he can prove, and is advised that they are sufficient to sustain a prosecution, and acting in good faith on that opinion, does institute an action, he is not liable in an action for malicious prosecution, though the opinion was erroneous. Justices of the peace are not required to be learned in the law, and do not pursue it as a profession. *Brobst vs. Ruff*, 30 *Pittsburg Journal*, 67. 100 Pa., 91. 14 *Lancaster Bar*, 102. 3 *York Record*, 131. *Berhofer vs. Weffert*, 159 Pa., 365, 374. *Hull vs. Smith*, 1 *Phila.*, 19. *Mahoffey vs. Byers*, 151 Pa., 97. *Marx vs. Mann*, 1 Pa. County, 262. *Saunders vs. Landes*, 6 *Montgomery Co.*, 77. *Smith vs. Walter*, 6 *Lancaster Review*, 413. 3. To sustain an action for the malicious use or abuse of civil process, the plaintiff must allege and prove that the defendant had not probable cause for the prosecution, and was actuated by malicious motives. The want of probable cause, without malice, is not sufficient to rebut the inference of malice; proof may be given of the advice of a lawyer. *Emerson vs. Cochran*, 111 Pa., 619. *Leahey vs. March*, 155 Pa., 458. *Smith vs. Walter*, 125 Pa., 453. 4. An action for malicious prosecution cannot be maintained until the prosecution or proceeding in which the arrest was made is at an end. *Harrison vs. Clarke*, 4 *Kulp*, 383. *Mayer vs. Walter*, 6 *Phila.*, 592. 5. To sustain an action for malicious prosecution, the plaintiff must establish affirmatively that the prosecution originated in the malice of the defendant, and was without probable cause. The presumption is that every prosecution is founded on probable cause. Malice may be inferred from the want of probable cause, but if there was probable cause for the prosecution, it matters not what malice may appear to have existed. The question of probable cause is a mixed question of law and fact. *Le Maistre vs. Hunter*, *Brightly's Rep.*, 494. *Cooper vs. Hart*, 147 Pa., 594. *Gilliford vs. Windel*, 108 Pa., 142. *Sutton*

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vs. Anderson, 103 Pa., 157. 14 W. N., 4 6. In an action for false imprisonment, it must appear that the prosecutor was guilty of some improper conduct, connecting him with the unlawful arrest. If a justice of the peace, through error of judgment, issues a warrant where none should issue, the error is his alone. *McElhattan vs. Kane*, 7 Pa. County, 314. 7. In an action to recover damages for an alleged malicious arrest on the charge of being an absconding debtor, it was held, that if the prosecutor in good faith consulted an alderman before making the information, and had honestly given him all the facts, and then acted on his advice, the presumption of malice and want of probable cause would be rebutted. *Miller vs. Slack*, 27 Pittsburg Journal, 203. *Thomas vs. Painter*, 10 Phila., 409. 8. If a prosecutor lays the facts of his case fairly before the district attorney, and follows his advice in instituting a prosecution, he cannot be held responsible in an action for malicious prosecution. *Reardon vs. Pierce*, 1 Chester Co., 323. 9. The statute of limitations of 1713 will, in two years, bar an action for malicious prosecution in wrongfully procuring the plaintiff to be arrested. *Reed vs. Wilson*, 2 Monaghan, 612. 10. Where a grand jury has found a true bill, the arrest was palpably under lawful process, and in a suit for damages for malicious prosecution, the action of case and not trespass is the proper remedy. *Royer vs. Swasey*, 10 W. N., 432. 11. Probable cause upon which to found a prosecution exists, only where the facts would lead a man of ordinary prudence to entertain a strong persuasion that a party was guilty. No mere suspicion, nor even a strong belief of guilt from the character, habits or countenance of the accused, can be admitted as a justification. *Stier vs. Labar*, 16 W. N., 273. 12. To render a prosecutor liable to suit for malicious prosecution, he must be shown actuated by malice without probable cause. It is the justice's duty to pass upon the facts, and determine whether a warrant shall issue. His functions are judicial. *Teal vs. Fissell*, 18 W. N., 71.

III. NEGLECT IN STIFLING. 1. A judgment note whose

Prosecution—Continued.

consideration is the stifling of a prosecution for forgery is void. *Tebay's Appeal*, 9 W. N., 151. 2. A mortgage whose consideration in whole or in part is the stifling of a prosecution for conspiracy and embezzlement as a bank officer, is void. *Pearce vs. Wilson*, 111 Pa., 14.

IV. NEGLECT TO PRESS. It is competent for a prosecutor in a case of false pretences, to compound the offence, it being a misdemeanor. *Steinbaker vs. Wilson*, Leg. Gaz. Report, 76.

Prothonotary.

I. NEGLECT, RESULTING IN LOSS OF PAPERS. The certificate of a prothonotary, that a writ, declaration or statement cannot be found in his office, is admissible in evidence, to prove the loss of such paper. *Ruggles vs. Gailey*, 2 R., 232.

II. NEGLECT IN ACCEPTING BANK CHECK. When the prothonotary accepts a check as money, and treats it as such in his entries, he takes the responsibility upon himself, and no other person can be injured thereby. *Wilson vs. Getty*, 27 Pittsburg Journal, 128.

III. NEGLECT IN CERTIFICATE. The sureties of a prothonotary are liable for damages incurred by a purchaser of land, through a mistake in the certificate of judgments. *Ziegler vs. Comm.*, 12 Pa., 227.

IV. NEGLECT IN CHARGES. Under the act of 1868, fixing the fees of the prothonotary, he can only charge for items allowed in the fee bill; items of service, not clearly within its provisions, must be performed without charge. *Clarke vs. Barber*, 2 Luzerne Law Times, 61. 8 Luzerne Register, 289. 1 C. P. Reporter, 57. *Sommers vs. Lackawanna*, 2 Luzerne Law Times, 189.

V. NEGLECT IN CORRECTING A RECORD. It is a grave misdemeanor on the part of a prothonotary to alter an entry in the judgment index without the authority of the court. Had the court been applied to, it would, in allowing a proper correction, have made it so that the interests of a prior lien creditor would have been protected. *Kendig's Appeal*, 82 Pa., 68.

Prothonotary—Continued.

VI. NEGLECT IN ISSUING EXECUTION. Prothonotaries shall enter on their dockets transcripts of judgments obtained before justices, which judgments from the date of entry shall bind real estate; but no *fiery facias* shall be issued by any prothonotary, until a certificate shall be first produced to him from the justice, stating that an execution had been issued to the proper constable and a return of "no goods" made. *Frankern vs. Trimble*, 5 Pa., 520.

VII. NEGLECT IN RECEIPT OF MONEY. A prothonotary, in his official capacity, should not receive anything but money in payment either of costs or of sums entrusted to him under the orders of a court or other competent authority. If he can take a note for money belonging to others, he may take a verbal promise to pay. It is contrary to his duty as a public agent to substitute his own personal responsibility. *Ellison vs. Buckley*, 42 Pa., 281.

VIII. NEGLECT IN RETURNING PAPERS FILED. The practice of delivering a note or bond upon which judgment is entered by the prothonotary, back to the plaintiff is bad. It should remain on file as the evidence of authority for the judgment, and the protection of the defendant. *Fraley's Appeal*, 76 Pa., 42.

IX. NEGLECT IN SATISFYING JUDGMENT. The erroneous satisfaction of a judgment by a prothonotary by a mere mistake, is such a breach of his official duty, as will render him and his sureties liable for damages sustained thereby. *Van Etters vs. Comm.*, 102 Pa., 596.

X. NEGLECT IN SEARCHES. For the accuracy and truthfulness of his search and certificate, the prothonotary is responsible to the person for whom it was made and not to others. The officer owes a single duty, which is to him who employs him to search and certify. If a new duty to another arises, it must be because of a new demand and a new privity. *Siewers vs. Comm.*, 87 Pa., 15.

XI. NEGLECT OF DUTY. 1. The prothonotary of the court of common pleas is merely the clerk of the court, and

Prothonotary—Continued.

has no authority, by virtue of his office, to act as the clerk, agent or attorney of any person. *Whitney vs. Hopkins*, 26 W. N., 337. 2. The clerk of the court is responsible to the party aggrieved for making a false certificate of record. *Work vs. Hoofnagle*, 1 Y., 506.

XII. NEGLECT TO ACCOUNT FOR MONEYS PAID INTO COURT. A prothonotary, short in his accounts of money paid into court, at the expiration of his term of office, is liable, with his sureties, for the deficit. *Yohe vs. Comm.* 2 **Monaghan**, 640.

XIII. NEGLECT TO ACT. A power of attorney to the prothonotary to discontinue a suit, cannot be executed by his clerk. The authority is personal and should be strictly pursued. The right to discontinue will not be permitted, where the plaintiff will be advantaged by it, or if prejudicial to his opponent. *Bank vs. Fisher*, 1 R., 346.

XIV. NEGLECT TO ATTEST A JURAT. A party is not to lose his rights on appeal from an award of arbitrators through the mistake or omission of the officer of the law. Where an appellant has done all the law requires, he cannot be affected by the failure of the prothonotary to discharge his duty. *Pottsville Borough vs. Curry*, 32 Pa., 444.

XV. NEGLECT TO COLLECT COSTS. The negligence or want of knowledge of the prothonotary, in granting an appeal from an award of arbitrators before the payment of the taxed costs will not condone the errors of a party in failing to do what the law requires. *Carr vs. McGovern*, 66 Pa., 457.

XVI. NEGLECT TO ENTER JUDGMENT ON DOCKET. 1. It is the creditor's duty to see that his judgment is properly entered on the docket; and if there is any mistake, the remedy of the party aggrieved is against the prothonotary. If the entry is in a wrong name, so that the searching may be misled, or if it is wrongly described in amount, third parties will be protected. *Coyne vs. Souther*, 61 Pa., 457. 2. A refusal or neglect by a prothonotary to enter judgment in a proper case, renders him and his sureties liable on his official bond, for any

Prothonotary—Continued.

damage accruing in consequence of such refusal or neglect. *Person vs. Weston*, 2 York Record, 92.

XVII. NEGLIGENCE TO INDEX JUDGMENT. 1. Where, through a prothonotary's error, a judgment was incorrectly indexed, resulting in it being postponed to later judgments in the distribution of the proceeds of real estate sold at sheriff's sale, and such prothonotary had promised to make good the loss if he were not sued, on the prothonotary's failing to do so, the party injured by the act may sue the prothonotary. In this case, suit was brought against the prothonotary more than six years ago; the mistake in indexing had been made, but within six months after the said promise. *Armstrong vs. Levan*, 109 Pa., 177. 2. A prothonotary, having neglected to index a judgment, afterwards interlined it in the judgment docket. In the distribution of the proceeds from a sheriff's sale, the auditor properly refused to hear evidence that the interlineation was made after the entry of the judgment. It was not his province to inquire into the correctness of the record. *Kindig's Appeal*, 2 W. N., 680.

XVIII. NEGLIGENCE TO INDEX SATISFACTION OF JUDGMENT. 1. It is the duty of a prothonotary to enter satisfaction on the judgment index, when a return to a writ shows that the money was paid. *Bratton vs. Leyrer*, 12 Pa. County, 651. 2 Pa. Dist., 457. 2. It is the duty of the prothonotary to attest the satisfaction of judgments entered into his court, but he cannot be required to note such satisfaction on the judgment index. *McIntire vs. Irwin*, 3 York Record, 108.

XIX. NEGLIGENCE TO MAKE ENTRY. A prothonotary, who wilfully neglects his duty is liable upon his official bond to any one, who may be thereby injured. When a party gives no particular instructions, the prothonotary could only be liable for omitting to make a special entry, not required by the act of assembly, in case he acted in bad faith. If he err in judgment as to the interpretation of a statute, he can no more be held liable than can a judge for an error in his judgment. *Comm. vs. Conard*, 1 R., 249.

Prothonotary—Continued.

XX. NEGLECT TO PAY MONEY TO SUCCESSOR. The court of common pleas has no power in a summary way by rule to compel the ex-prothonotary to pay money in his hands to his successor. *Matz, In re*, 1 Foster, 14.

XXI. NEGLECT TO PERFORM OFFICIAL DUTY. While it is competent for a prothonotary to receive and file a paper at his residence after office hours, and to docket it the next day as of the day when filed, yet he is not bound to perform official acts at an unreasonable hour. *Polhemus' Appeal*, 32 Pa., 328.

XXII. NEGLECT TO RETURN MONEY DEPOSITED. The prothonotary as an involuntary depositary, should take such care of the deposit as prudent men actually exercise. It is not his duty to retain in his own pocket the identical pieces of money which were paid into court. Where the original money placed in his hands was in gold, which the prothonotary deposited in bank without profit to himself from the subsequent rise of value of coin, he may, on demand for payment, pay it in legal tender notes. *Aurentz vs. Porter*, 56 Pa., 115.

XXIII. NEGLECT TO SAFELY KEEP PAPERS. Office papers should remain in the court office, where the attorneys, on permission of the prothonotary, may examine them. If papers are carried away, with the consent of the prothonotary, and lost, he is responsible for their loss. *Nussear vs. Arnold*, 13 S. & R., 327.

Proximate and Remote Cause.

1. A proximate cause is one which, in actual sequence, undisturbed by any independent cause, produces the result complained of. *Behling vs. Pipe Lines*, 160 Pa., 359. 2. Damages cannot be recovered from a defendant for an accident of which his negligence is not the immediate cause, or so proximate a cause that the accident might have been reasonably foreseen as likely to happen therefrom. *Eisenbrey vs. Phila.*, 24 W. N., 231. *Finch vs. Heermans*, 5 Luzerne Register, 125. *Hunter vs. Wanamaker*, 17 W. N., 232. 3. As a general rule, one is answerable for the consequences of his

Proximate and Remote Cause—Continued.

fault only so far as they are natural and proximate, and may therefore be foreseen by ordinary forecast; not for those arising from a conjunction of his fault with circumstances of an extraordinary nature. A man mounted on a pile of flagstones in a street to make a speech; a crowd of hearers got on the stones and broke them. Held, it was not a legal conclusion that the speaker was liable for the breaking of the stone by the bystanders. Making a speech in the street is not, *per se*, a nuisance. *Fairbanks vs. Kerr*, 70 Pa., 86. *Allegheny vs. Zimmerman*, 95 Pa., 287, *Hunter vs. Wanamaker*, 17 Phila., 337. *McCauley vs. Logan*, 152 Pa., 202. *Schaeffer vs. Jackson*, 150 Pa., 145. 4. When, in the opinion of the court, the uncontradicted evidence does not warrant the jury in inferring negligence as the proximate cause of an injury, the court should direct a verdict for the defendant. *Goshorn vs. Smith*, 92 Pa., 435. 5. In considering what is the proximate cause of a certain occurrence, the jury must determine whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether they be so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause. This rule is not affected by the lapse of time between the several occurrences, or by the distance between the places involved. *Haverly vs. R. R.* 38 *Pittsburg Journal*, 30. 135 Pa., 50. 6. If two distinct causes are operating at the same time to produce a given result, which might be produced by either, they are concurrent causes. But if two distinct causes are successive and unrelated in their operation, one of them must be the proximate and the other the remote cause. In such case, the law regards the proximate as the efficient and responsible cause, and disregards the remote. *Herr vs. Lebanon*, 149 Pa., 222. 7. In an action for negligence, where the testimony as to the cause of the injury was conflicting, it is not error for the court to decline to say that the cause was too remote to render the defendants liable. *Holmes vs. Watson*, 29 Pa., 457. 8. It is a universal rule, resting on reason and justice, that a

Proximate and Remote Cause—Continued.

wrong-doer shall be held responsible for the proximate and not for the remote consequences of his actions. Every defendant should be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was, therefore, under no moral obligation to take into consideration. *Jones vs. Gilmore*, 91 Pa., 310. 9. In a policy of fire insurance, the insurer is liable, if the proximate cause of the loss be one of the perils insured against, even though the remote cause be the negligence of the insured. *Lebanon Ins. Co. vs. Kepler*, 106 Pa., 28. 10. In nearly all cases, the rule for determining what is a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and this might or ought to have been foreseen under the surrounding circumstances. These circumstances must be referred to a jury. All the court can do is to aid the jury by pointing to the relations of the facts. The jury must determine whether the original cause is, by continuous operation, linked to each successive fact. *Penna. R. R. vs. Hope*, 80 Pa., 378. *Penna. & N. Y. Canal Co. vs. Lacey*, 89 Pa., 458. *Lehigh Valley R. R. vs. McKeen*, 90 Pa., 122. 11. Carriers are answerable for the ordinary and proximate consequences of their faults, and not for those that are remote and extraordinary. *Morrison vs. McFadden*, 5 Clark, 23. *Morrison vs. Davis*, 20 Pa., 171. 12. Where oil escaped from a refinery situate remote from a city, and flowed into an adjacent river, without negligence on the part of the owner of the refinery, and in some way caught fire and destroyed a tugboat, the loss was held, not to be the direct result of any default on the part of the owner of the refinery. *Neal vs. Refining Co.*, 16 Pa. County, 241. 13. In determining accountability for the consequences of a wrongful act, the immediate and not the remote cause is to be considered. The question is, did the cause alleged produce its effects without another cause intervening, or was it made to operate only through or by means of this intervening cause? The maxim is not to be controlled by time

Proximate and Remote Cause—Continued.

or distance, but by the succession of events. The person committing the first act of negligence is not liable for all its consequences. *Penna. R. R. vs. Kerr*, 62 Pa., 353.

14. A warehouse, situated near defendants' track, had been ignited by sparks from a locomotive; the burning warehouse, in turn, communicated fire to the plaintiff's building, distant forty feet, and destroyed it. Held, that the proximate cause of the plaintiff's loss was the burning warehouse; that the defendants' negligence was but the remote cause, and hence the defendants were not liable to the plaintiff. *Penna. R. R. vs. Kerr*, 18 *Pittsburg Journal*, 17. *Hoopes vs. R. R.*, 2 Chester Co., 106.

15. The rule in determining proximate cause, that the injury must be such a natural and probable consequence of the alleged negligent act as ought to have been foreseen by the wrong-doer, is peculiarly applicable to accidents resulting from the fright of a horse. *Pittsburg Southern R. R. vs. Taylor*, 15 W. N., 57. 104 Pa., 306.

16. One guilty of an act of negligence, will be held to have foreseen and to be responsible for whatever consequences resulted from his negligence, without the intervention of some other independent agency, disconnected from the primary fault and self-operating, although in advance the actual result may have seemed impossible. *Quigley vs. Canal Co.*, 142 Pa., 388. *Bunting vs. Hogsett*, 139 Pa., 363.

17. When, in an action for negligence, the fact is undisputed that the injury received was inflicted by an intervening agency over which the defendant had no control, the question of remote or proximate cause must be determined by the court, and the jury instructed accordingly. *South Side Ry. Co. vs. Trich*, 117 Pa., 390. 20 W. N., 324. *Newhart vs. R. R.*, 2 Northampton Co., 374.

18. In order to defeat recovery of damages arising from the defendant's negligence, the plaintiff's negligence must have been the proximate and not the remote cause of the injury; in other words, must be its juridical cause, and not merely one of its conditions. The negligence must be such, that by the usual course of events it would result, unless independent moral agencies

Proximate and Remote Cause—Continued.

intervene, in the particular injury. My remote negligence will not protect a person who, by proximate negligence, does me an injury. *Thirteenth Street Ry. Co. vs. Boudrou*, 92 Pa., 475. 19. When a person has been put in sudden peril by the negligent act of another, and in an instinctive effort to escape from that danger, falls upon another peril, it is immaterial whether, under different circumstances, he might and ought to have seen and avoided the latter danger. *Vallo vs. Express Co.*, 147 Pa., 404. 20. The question of proximate cause, where the facts are disputed, is for the jury; where they are undisputed, the court may determine it. In determining what is proximate cause, the rule is that the injury must be the natural and probable consequence of the negligence; such a consequence might and ought to have been foreseen by the wrong-doer as likely to flow from his act. *West Mahanoy Turnpike vs. Watson*, 112 Pa., 574. 116 Pa., 344. 17 W., N., 465. *Ewing vs. R. R.*, 147 Pa., 44. *Hoag vs. Lake Shore R. R.*, 85 Pa., 293. *Drake vs. Keely*, 93 Pa., 498. *Mack vs. Ry. Co.*, 8 Pa. County, 305. 20 Phila., 207. *Raydure vs. Knight*, 3 W. N., 109. 2 W. N., 713. 21. The responsibility for negligence does not extend to all the consequences that may possibly result from that negligence, but to those consequences only that, under the circumstances, might and ought to have been foreseen. *Wood vs. R. R.*, 36 W. N., 410.

Q

Quarries.

I. NEGLECT IN BLASTING. 1. Where no negligence was shown in the use of dynamite for blasting, and the injury was not the proximate result of the act complained of, and where the plaintiff, a woman of highly nervous temperament, placed herself in a position where she would hear frequent concussions, held, she could not recover damages. *Fox vs. Birkey*, 126 Pa., 164. 2. Where, in contiguous quarries, it was a custom of long standing between the respective operatives for their mutual accommodation to give notice of impending blasts, failure to do so on the part of either is negligence. *Martins vs. Stephens*, 1 Northampton Co., 191. 3. An explosion in a quarry whereby a servant is injured, raises no presumption of negligence on the part of the master. There can be no inference of negligence from the mere fact of the injury, except in cases against common carriers. *Pizzirussi vs. Dyer*, 7 Montgomery Co., 195. 4. An injunction will issue to restrain the owner of a quarry from blasting, where injury is done to a dwelling in the vicinity. *Sayer vs. Johnson*, 4 Pa. County, 361. 3 Delaware Co., 323. 5. It is the duty of the operators of a stone quarry to give timely warning of a blast. In a disputed case, whether such warning was given or not is a question for the jury. *Stephens vs. Martins*, 23 W. N., 475. 37 *Pittsburg Journal*, 11.

II. NEGLECT IN EXCAVATING. 1. No one will be permitted so to excavate his land as to do a permanent injury to the land of his adjoining neighbor, when such adjoining land is in its natural condition. *Bell vs. Reed*, 2 *Foster*, 266. 22 *Pittsburg Journal*, 49. 2. Quarries open at the beginning of a life estate may be worked by the life tenant even to exhaustion, without rendering him liable in damages for waste.

Quarries—Continued.

Sayers vs. Hoskinson, 110 Pa., 473. 3. Every man has a right to the undisturbed possession of his own land, but he must not use it in a manner destructive of his neighbor's rights. He will be enjoined from quarrying or excavating his land so near the plaintiff's, as to take away the natural lateral support. *Wier's Appeal*, 81x Pa., 203.

III. NEGLECT TO ENCLOSE. 1. The owner of a private quarry is under no legal obligation to fence the excavation, unless it was made so near to a public road as to render the lawful use of such road dangerous. The fact that the owner of the quarry permitted the public to pass his quarry by a path which led from one public highway to another, made no difference. The public must take the permission with its incidental perils. *Gillis vs. Penna. R. R.*, 59 Pa., 141. 2. Where the fence separating an open quarry from an adjoining field was in a badly decayed condition, it was contributory negligence on the part of the owner of a horse to pasture him in such field, knowing of the dangerous condition of the fence and the quarry. *Krum vs. Anthony*, 115 Pa., 431.

Quo Warranto.

I. NEGLECT IN ISSUING WRIT. 1. A private relator, on whose suggestion a writ of *quo warranto* may issue, must be one who has an interest to be affected, or wrong to be redressed. *Comm. vs. Brosnahan*, 1 Schuylkill Record, 59. 2. *Quo warranto* is in the nature of a writ of right for the commonwealth against one who usurps or claims any franchises or liberties. When issued on the information of the attorney-general, it is for a public wrong; when by a private relator, it is to redress a private injury; though the object is the same, they are instituted on different grounds. A mere stranger cannot have the writ; he must show some interest to be affected, or wrong to be redressed. *Comm. vs. Dillon*, 81x Pa., 41. 3. A writ of *quo warranto*, when issued in vacation, must be by leave of the president judge. *Comm. vs. Evans*, 1 C. P. Reporter, 44. 4. The writ of *quo warranto* is not of right

Quo Warranto—Continued.

and of course, but is issuable only according to the sound discretion of the court, regulated by the circumstances of each particular case. *Comm. vs. McCutchen*, 2 Parsons, 207.

II. NEGLECT OF NOTICE. In a *quo warranto*, an order for service of notice of the information on persons interested residing out of the state may be made under act of June 4, 1836. Liability to notice in case of non-residence is a condition under which a non-resident becomes a corporator or an officer in a corporation. The notice is not compulsory process, and hence is not an invasion of the rights of the state of the resident. The legislature may provide for serving notice on parties out of the state, interested in litigation in the state, and in default of appearance adjudicate on the interest. *Comm. vs. Dillon*, 61 Pa., 488.

III. NEGLECT TO GRANT WRIT. 1. The issuing of a writ of *quo warranto* is in the sound discretion of the court. It will not be issued when the term expires before the case can be heard. *Comm. vs. Amsden*, 4 Luzerne Law Times, N. S., 53. 2. A writ of *quo warranto* is not a writ of right. It rests in the discretion of the court whether the writ shall be allowed. *Comm. vs. Davis*, 109 Pa., 128. 16 W. N., 379. 3. Private citizens, having no special interest to be affected, have not the right to ask for a writ of *quo warranto* to oust a member of councils. *Comm. vs. Horne*, 10 Phila., 164. 4. While the granting of a writ is in the discretion of the court, it is a legal discretion, depending upon the law and all the circumstances of the case. *Comm. vs. Philips*, 2 Luzerne Law Times, 83. 5. *Quo warranto* is not allowed at the instance of a private relator in a case of public right, involving no individual grievance. *Comm. vs. Stevens*, 6 Luzerne Register, 37. 6. The writ of *quo warranto* is not of right, and will never be issued at the instance of a private relator who has not a direct interest in the office in question. *Comm. vs. Trimble*, 6 Kulp, 17. *Comm. vs. Casey*, *Idem*, 161.

IV. NEGLECT TO QUASH. A motion to quash a writ of *quo warranto* must be for some defect in the suggestion itself,

Quo Warranto—Continued.

not for any matters outside. Mere defects in form that can be amended, will not be regarded on a motion to quash. *Comm. vs. Graham*, 64 Pa., 339.

V. NEGLECT TO SERVE. If a writ of *quo warranto* be not served at least ten days before return day, the court will, on motion, set aside the service, but will not quash the writ. *Comm. vs. Gets*, 16 Pa. County, 278.

R

Rafts.

I. NEGLECT BY INTERRUPTING CHANNEL. Where a raft lodges in a small stream and interrupts the channel, preventing the passage of another raft, the owner of the second raft may lawfully cut away a portion of the first one, after waiting a reasonable time for its removal, and doing no unnecessary damage. *Philiber vs. Matson*, 14 Pa., 306. *Beach vs. Schoff*, 28 Pa., 197.

II. NEGLECT IN TOWING. The owners of a steamboat, employed in towing boats, are not common carriers. In this case, the steamboat left the raft fastened to the shore, from which it was carried adrift, and part of it lost. *Leonard vs. Hendrickson*, 18 Pa., 40.

III. NEGLECT OF PILOT. The owner of a raft, though not present, is liable for any damage which may be done to the property of others upon the river, occasioned by the negligence or unskillfulness of his pilot. *Shaw vs. Reed*, 9 W. & S., 72.

Railroads.

I. NEGLECT BY APPROPRIATING PRIVATE PROPERTY. 1. The right of the commonwealth to take private property without the owner's consent on compensation made, or authorize it to

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be taken, exists in her sovereign right of eminent domain, and can never be lawfully exercised except for a public purpose. The use of the property must be held for the purpose which justified its taking. Hence a railroad company cannot build private houses and mills, or erect machinery not necessarily connected with the use of their franchise, within the limits of their right of way. *Lance's Appeal*, 55 Pa., 25. 2. If a railroad company enters on land unlawfully and without assessment of damages, ejectment is the proper remedy, and the question is title, not charge for damages. When the commonwealth exercises the power of eminent domain, it must provide the means of payment before taking property; a corporation or individual must pay or secure its price. Where a railroad company has tortiously entered and taken possession of land for their road, the owner may proceed in the mode provided by statute to assess damages. *McClinton vs. Pittsburg & Fort Wayne R. R.*, 66 Pa., 404. 3. Under its right of eminent domain, the commonwealth may take private property for public use. The legislature may grant to railroad corporations the right to take private property for public use, provided said companies make just compensation to the owners. Until actual payment of the damages agreed upon or ascertained, or security given, the corporation has no right to construct or enlarge its works on private property, nor to injure or destroy the same. *Gilmore vs. R. R.*, 104 Pa., 280. *Philadelphia & Newtown R. R., vs. Cooper*, 105 Pa., 239. 4. A railroad company is liable under our constitution to make compensation for property injured or destroyed by the construction or enlargement of its works in the subsequent exercise of the right of eminent domain, although there be no physical taking of such property or any portion thereof. *Penna. R. R. vs. Duncan*, 129 Pa., 181. 5. When a railroad has been located and the land appropriated, the right of the landowner to sue for his damages is complete, and he may recover for all which may be caused by the location and the subsequent construction; but he can have but one action, as

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the damages cannot be severed. The damages must be paid or secured before the injury. *O'Brien vs. R. R.*, 119 Pa., 190.

6. The act of February 19, 1849, reads: "That whenever any company shall locate its road upon any street in any city or borough, ample compensation shall be made to the owners of lots fronting upon such street for any damages they may sustain by reason of any excavation or embankment made. *Pittsburg R. R. vs. Rose*, 74 Pa., 362.

7. In taking possession of land under the act of March 17, 1869, a railroad company is not confined to the present needs of its business, but may properly provide for the future requirements of a more extended traffic. *Lodge vs. R. R.*, 8 Phila., 345.

8. In an action to recover damages for land affected by the construction of a railroad, the measure of damages is the difference between the market value of the property immediately before and after such construction and location. *Beck vs. R. R.*, 148 Pa., 271. *Harvey vs. R. R.*, 47 Pa., 428. *Setzler vs. R. R.*, 112 Pa., 56. *East Brandywine R. R. vs. Rauck*, 78 Pa., 454. *Pittsburg R. R. vs. Bentley*, 88 Pa., 178.

9. The correct rule in estimating damages for land taken by a railroad company, is the difference in value of the tract taken as a whole before its appropriation and subsequently. *Hoffmann vs. R. R.*, 157 Pa., 174. *Beck vs. R. R.*, 148 Pa., 271. *Pittsburg R. R. vs. McCloskey*, 110 Pa., 436.

10. The rule for the measure of damages for the taking of land by a railroad company for tracks, under the right of eminent domain, is the same whether the damages be to the tenant in fee, for life or for years. *Phila. & Reading R. R. vs. Getz*, 113 Pa., 214.

11. Market value, as a measure of damages for land taken or injured by a railroad company, cannot be ascertained by evidence of particular sales of adjacent properties, as such evidence would introduce collateral issues. The adaptation of the property to any particular use to which it has been or may be applied is a proper element to be considered by the jury in estimating its market value before and after the locating of the railroad. *Pittsburg & Western R. R. vs. Patterson*,

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107 Pa., 461. 12. In assessing the damages caused by the construction of a railroad through a farm, a proper standard is the market value of the land taken; and the jury may also allow for the disadvantage resulting from the manner in which the road was cut. *East Pa. R. R. vs. Hottenstine*, 47 Pa., 28. 13. The measure of damages for building a railroad through a man's land, is the difference between the value of the property before and after building the road. Such advantages only as are special and peculiar to the property in question, not common to the public, are to be considered. *Hornstein vs. Atlantic R. R.*, 51 Pa., 87. 14. The measure of damages for the appropriation of land by railroad companies for the purpose of laying tracks, etc., is the depreciation of the market value of the property caused by the location and construction of the railroad. A specification of elements of damage is impossible, because they cannot be anticipated. Opinions of witnesses conversant with the property taken and the general selling price of lands in the vicinity are received on the question of its value, but this is not exclusive of other modes of proof. *Schuylkill River R. R. vs. Kersey*, 25 W. N., 455. 15. It may be stated as a general principle, that whatever injuriously affects the property of a party, as the direct and necessary result of the location of a railroad upon it, may be considered in the assessment of damages. The proper measure of damages is the depreciation in the market value of the property, caused by the location and construction of the railroad. *Kersey vs. R. R.*, 133 Pa., 240. 16. In an action against a railroad company for damages done to a mill property by the construction of the road, the injury to the unused and surplus water power of the plaintiff is a legal ground of claim, and the measure of damages is its actual market value for any useful purpose, the mill property remaining as it was when the road was constructed. *Dorlan vs. R. R. Co.*, 46 Pa., 520. 17. If the location of a railroad so affects the property as to compel the removal of the business conducted by tenants to another place, and the machinery

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used is in consequence depreciated as it stands, the loss by removal of the machinery is a proper element of damage to be considered. *Phila. & Reading R. R. vs. Getz*, 113 Pa., 214. 18. A water power, situate on a small stream, is such a property as a railroad company is liable to make compensation for, if damaged by the construction of their road, although the stream may have been declared a public highway by statute. *Barclay R. R. Co. vs. Ingham*, 36 Pa., 194. 19. Where a railroad is so constructed as to interfere with or block up a water channel, the company is responsible for all the direct consequences of diverting the water from its natural course. *Gordon vs. R. R.*, 6 W. N., 405. 20. In a question of damages for the construction of a railroad, evidence was proper, that the construction of the road tended to decrease the business of a mill by making it unsafe to drive horses near it, and dangerous of approach. Such damage is not consequential and prospective, but immediate and direct. When the deterioration of property arises from actual and not speculative causes, and will probably continue, there is ground for damages. *Western Penna. R. R. vs. Hill*, 56 Pa., 460. *Wilmington & Reading R. R. vs. Stauffer*, 60 Pa., 374. 21. Damages for land taken by a railroad are a personal claim of the owner when the injury occurred; they do not run with the land, nor pass by a deed to a purchaser, though not reserved. *McFadden vs. Johnson*, 72 Pa., 335. 22. When a railroad company has located its road through a man's land, and had the damages assessed by viewers and confirmed by the court, this is a judgment in favor of the owner of the land, and he is entitled to execution, even though the company had not taken possession and had changed its route. *Neal vs. Pittsburg R. R.*, 31 Pa., 19. 23. A farmer may continue cultivating his land after the location of a railroad upon it, until actual entry by the company, and may recover compensation, not only for injuries to the land, but for the loss of growing crops planted before bond given or notice of an intent to enter for construction. *Lafferty vs. R. R.*, 124

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Pa., 297. 24. A railroad company contracted in consideration of the conveyance of a parcel of land to erect thereon a freight station. In a suit against the company for breach of contract, held, that the proper measure of damages was not the value of the land conveyed, but the injury suffered by the plaintiff by the failure to erect the station thereon. *West Chester R. R. vs. Broomall*, 18 **W. N.**, 44. 25. An agreement between a landowner and a railroad company to sell the latter a right of way across the premises of the former, covers all damages, of whatsoever sort, suffered by the landowner, for which he is legally entitled to compensation. *North Branch R. R. vs. Swank*, 105 **Pa.**, 555. *Jones vs. R. R.*, 143 **Pa.**, 385. 26. Where the owners of land, for valuable consideration, released a railroad company from all claims by reason of its entry and location and construction, such release is a bar to a subsequent action by a lessee of said owner to recover damages for injuries caused by an insufficient culvert made prior to the execution of the release. *Hoffeditz vs. Mining Co.*, 129 **Pa.**, 264. 27. A release of the right of way to a railroad company, together with all damages resulting by reason of the location, construction, maintenance and operation of the railroad, does not cover injuries resulting from subsequent negligence of the company in failing to make or maintain proper and sufficient drains or culverts. *McMinn vs. R. R.*, 147 **Pa.**, 5. 28. A railroad company is required to make compensation to the owner of lands, or to tender adequate security therefor, before entering upon or taking possession. *Scranton R. R. vs. Canal Co.*, 1 *Lackawanna Jurist*, 93, 149. 29. A corporation obtaining a concession to enter on condition of refraining from a particular injury, in its nature irreparable, and which cannot be readily estimated in damages, forfeits its license when it violates this condition, and should be restrained until it does equity. *Unangst's Appeal*, 55 **Pa.**, 138. 30. An injunction will be issued to restrain the laying of railroad tracks, unless the owner of the land has been compensated or indemnified. *Beidler's Appeal*, 37 **Pittsburg Journal**,

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58. 31. The directors of a railroad company will not be restrained in equity as to the location of the road, unless it is shown they capriciously or wantonly disregard the rights of others. *Anspach vs. R. R.*, 5 Phila., 491. 32. A manufacturing company cannot acquire by a lease from a railroad company the right of eminent domain vested in the latter, so as to be enabled to construct and operate a railway upon the streets of a borough, even with the consent of the municipal authorities. *Barker vs. Steel Co.*, 129 Pa., 551. 33. Under the act of April 9, 1856, appeals from the assessment of railroad damages must be entered within thirty days from filing, not from the confirmation of the report of the viewers. *Gwinner vs. Lehigh R. R.*, 55 Pa., 126. 34. The court has power to set aside the report of viewers to assess the damages caused by the building of a railroad, when the sum allowed was exorbitant, but this must be clearly made out. Only those damages should be considered that result from the ordinary use of the road, and not those arising from unskillfulness, carelessness or wantonness on the part of the company. Probable future legislation should not be considered. *Patten vs. R. R.*, 1 Pearson, 48. 35. A claimant may delay proceedings for damages in constructing a railroad, till the completion of the road. The assessment of damages is not a penalty, which may be barred by the limitation act relating to suits for penalties. The cost of fencing cannot be allowed in estimating damages from the construction, but how much the burden of fencing would detract from the value of the land may be considered by the jury. Interest should be added to the amount of damages from the time the landowner was entitled to compensation. A jury is not bound to state the items of damage in their verdict. *Delaware & Lackawanna R. R. vs. Burson*, 61 Pa., 369.

II. NEGLIGENCE OF LIABILITY FOR CONSEQUENTIAL DAMAGES.

1. Prior to the constitution of 1874, a railroad company was not liable for consequential damages. *Cleveland & Pittsburg R. R. vs. Speer*, 56 Pa., 326. *Struthers vs. Dunkirk R. R.*, 87 Pa., 282. *West Branch Canal Co. vs. Mulliner*, 68 Pa.,

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357. . *N. Y. & Erie R. R. vs. Young*, 33 Pa., 175. *Rose vs. R. R.*, 20 Pittsburg Journal, 159. 2. The constitution of 1874 expressly declares that compensation shall be made not only for property taken by a corporation for public use, but also for property injured or destroyed. This abrogates the former rule on the subject. If just compensation has not been paid or secured, the proper remedy is an action on the case for damages. A railroad company invested by its charter with the right of eminent domain, shifted and relaid its tracks nearer to the plaintiff's house, thus depreciating its value, though actually taking none of his property. Held, that an action on the case lay for damages. *Patent vs. R. R.*, 14 W. N., 545. 3. Under article 16 of the constitution, a person can recover against a railroad company for injury to his property resulting from the operation of the road, including noise, smoke, dirt, vibration and danger, of fire. He may obtain consequential damages, and is not limited to such injuries as would be actionable at common law. Damages are recoverable for injuries resulting from the operation of the road after its completion, as well as for those incident to its construction. The measure of the damage sustained is the actual loss in the value of the property, its depreciation, owing to the presence of the railroad. *Pittsburg Junction R. R. vs. McCutcheon*, 18 W. N., 527. 4. Except on proof of negligence, the lawful use of a railroad company of a lawful erection entirely upon its own property, is not the subject of damage. A railroad company constructed an elevated roadway upon its own property lying on one side of a street, and operated its steam railway thereon. From the noise, smoke and dust caused by the engines and cars, the necessary consequence of the operation of the railroad, injuries resulted to the plaintiff's property on the opposite side of the street. Held, he was not entitled to damages. *Penna. R. R. vs. Lippincott*, 116 Pa., 472. *Penna. R. R. vs. Marchant*, 119 Pa., 541. 5. Where a railroad is laid upon a public street, and by its operation in a lawful manner access to the property of an

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abutting owner is rendered dangerous, the company is liable for consequential injuries. Thus locating the tracks on a highway directly in front of plaintiff's curb, so as to obstruct the access of vehicles, will entitle the plaintiff to recover the damages he may sustain in the market value of his property. The constitutional provision was not intended to apply to injuries which are the result merely of the operation of the road as distinguished from its construction; hence there can be no recovery for the annoyance of smoke, noise and cinders caused by the running of trains, unaccompanied with negligence. Injuries resulting from the exercise of a lawful business, in a lawful manner, without negligence and without malice, are *damnum absque injuriâ*. *Penna. Schuylkill Valley R. R. vs. Walsh*, 124 Pa., 544. *Ibid vs. Ziemer, Idem*, 560. 6. The necessities of a railroad company and the public character of its business compel it to seek the heart of a city; and where upon its own property it has constructed its roadway, without taking any property of the plaintiff, it is not liable for indirect injuries to the plaintiff which are the result merely of the subsequent operation of its road in a lawful manner, without negligence, unskillfulness or malice. *Penna. R. R. vs. Marchant*, 119 Pa., 542. *Domer vs. R. R.*, 142 Pa., 36. 7. Depreciation in the value of land occasioned by the construction of a railroad is not, in any legal sense, a consequential damage. *Turner vs. R. R.*, 8 Phila., 485.

III. NEGLECT BY ENCROACHING ON HIGHWAY. 1. A railroad company has no right, in constructing its road across a public highway, to encroach upon the road, so as to render it less commodious to the general public, without showing some actual necessity. *Schwenk vs. R. R.*, 2 Chester Co., 177. 2. Although a railroad company may construct its railroad across any established highway whenever it is necessary to cross or intersect it, it must be so constructed as not to impede the passage or transportation of persons or property along the road. If it be so constructed as to be a dangerous

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obstruction to travel along the road, the company may be indicted therefor. *Comm. vs. R. R.*, 117 Pa., 643. 3. While the mere construction of a railroad track across a public highway, in pursuance of law, is no nuisance, it must be constructed in such a way as not to impede travel. The fact that the crossing has existed in its present condition for twenty-four years, is no answer to an indictment for maintaining a nuisance, as the statute of limitations does not run against the Commonwealth. *Northern Central R. R. vs. Comm.*, 9 W. N., 129. 4. A railroad company may construct its railway across a road if necessary, but it must so construct it, that it will not impede the passage or transportation of persons or property over said road. If it prove a serious inconvenience and dangerous obstruction to travel along the road, the company may be indicted therefor. *Northern Central R. R. vs. Comm.*, 90 Pa., 300. 5. A railway corporation may take possession of such portion of any public road as may be within the limits of the right of way, and may construct its railway across any road if necessary ; but the railroad must be so constructed as not to impede passage on the highway. If the railroad proves to be a dangerous obstruction to travel along the road, the company may be indicted therefor. *Comm. vs. R. R.*, 117 Pa., 637. 6. It is the duty of railroad companies appropriating a public road and substituting a new one, to guard the public against danger of injury by erecting barriers enclosing excavations. *Pittsburg & Chartiers R. R. vs. Moses*, 17 W. N., 76. 7. Where an act of assembly gave a railroad company power to construct its tracks on a portion of a public road, it was held, that the obstruction of travel on such portion was not a nuisance which should be abated. *Danville & Hazleton R. R. vs. Comm.*, 73 Pa., 29. 8. A railroad company cannot occupy a street to the exclusion of the public, without locating or constructing another street in the place of the street so taken. *Stroudsburg vs. R. R.*, 12 Pa. County, 395. 9. The legislative grant to a railroad company of a right to build a railroad along certain streets of a city, does not

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authorize a railroad occupying the whole of the street to the exclusion of other railroad companies or individuals. *Phila. & Reading R. R. vs. R. R.*, 1 Foster, 137. 10. The legislature may authorize a railroad company to lay its tracks on a public street, but without a legislative grant, the company has no right to appropriate and use a public street or highway for its tracks, switches or sidings. *Penna. R. R. Co.'s Appeal*, 115 Pa., 514.

IV. NEGLECT BY APPROPRIATING DWELLING HOUSES.

1. In the location and construction of a railroad, the act of February 19, 1849, prohibits the company from passing through any dwelling house in the occupancy of the owner without his consent. This necessarily includes such curtilage connected with and necessary to the dwelling. *Swift's Appeal*, 111 Pa., 516. 2. The act of February 19, 1849, prohibits the construction of any railroad through a dwelling house occupied by its owner. This will not prevent the appropriation of a strip of land in the rear of a house. *Lyle vs. R. R.*, 131 Pa., 437. 3. Where a railroad company laid a track in front of plaintiff's dwelling, cutting away part of his porch, and in the running of its trains obstructing ingress and egress, and the access of light and air, shaking the walls of the house and permeating it with smoke and cinders, the plaintiff, in an action against the company for damages, could show these facts, and also the resulting depreciation in the value of his property. Our present constitution requires compensation to be given for property taken, injured or destroyed by municipal or other corporations in the construction or enlargement of their works. *Northern Central R. R. vs. Holland*, 117 Pa., 613. 4. The act of February 19, 1849, provides, that no railroad shall be built so as to pass through any dwelling house occupied by its owner without the owner's consent. The curtilage appurtenant to the dwelling house is not included in this prohibition. *Damon vs. R. R.*, 2 Delaware Co., 293.

V. NEGLECT TO ERECT CATTLE GUARDS. 1. At the crossings of the public roads, or wherever cattle are in the habit of

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straying, it is the duty of a railroad company to use the utmost vigilance to keep them off, and in all such places to erect cattle guards, put up fences, or station watchmen for the purpose. A failure to do so is negligence, rendering the company liable to passengers for all injuries occasioned thereby.

Wright vs. R. R., 3 Pittsburg, 116. 2. In an action against a railroad company to recover damages for killing a cow, it is not sufficient defence for the railroad company to show that the cattle guards in use are, in the judgment of experienced railroad managers, proper and effectual, if there is actual evidence in the case that they are not effectual to turn cattle. *Penna. R. R. vs. Jakes*, 20 W. N., 570.

VI. NEGLECT TO CONSTRUCT CAUSEWAYS. Under the act of February 19, 1849, whenever, in the construction of a railroad, it shall be necessary to cross any road, it shall be the duty of the railroad company to make necessary causeways to enable the occupants of adjacent lands to cross over the same with wagons, which causeways shall be maintained and kept in good repair by the company. On failure to do so, the company shall be liable in damages to any person aggrieved thereby. *Dubbs vs. R. R.*, 148 Pa., 68.

VII. NEGLECT TO FENCE THE TRACKS. 1. A railroad company is not bound to make fences along its tracks, unless required by its charter. The act of April 13, 1868, requiring railroad companies within Erie county to rebuild fences destroyed by fire from their trains, is within the police power of the state, and is constitutional. *Penna. R. R. vs. Riblet*, 66 Pa., 164. 2. By the act of March 28, 1868, railroad companies are required to erect and maintain fences along the tracks of their roads in the county of Warren, and to construct cattle guards at all the public road crossings. Neglect to do this renders them liable in damages. *Dunkirk R. R. vs. Mead*, 90 Pa., 454. 3. In certain counties of the state, railroad companies, by special statutes, must fence their roads, and in default thereof are liable for the value of live stock injured in consequence of their neglect. *Curtin vs. R. R.*, 135 Pa., 20. 4. The law is settled in this

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state, that if cattle are suffered to run at large, and are injured or killed on the track of a railroad, without wantonness or gross negligence, the owner has no recourse against the company or its servants. This is true, though they escape from a properly fenced enclosure. *R. R. Co. vs. Skinner*, 19 Pa., 298. *North Pa. R. R. vs. Rehman*, 49 Pa., 105. 5. If cattle are accustomed to wander on unenclosed grounds, through which a railroad runs, the company is bound to take notice of this fact, and either by fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the train, or in some other manner, to secure the safety of the passenger. If they tolerate obstructions, they must avoid the danger by reduced speed and increased vigilance, or answer for the consequences. *Sullivan vs. Reading R. R.*, 30 Pa., 234. 6. Although a railroad company may not be bound to fence its track against trespassing cattle, it is well settled, that as between its passengers, it must take the risk of injury to them from such cause, and it is no answer to a claim for injury from such cause, that the defendant was not bound to fence, or that cattle were trespassing on its track without its agency or knowledge. The question is, did the company exercise due care to guard against such obstructions? *Lackawanna R. R. vs. Chenewith*, 52 Pa., 382. 7. The conductor of a train is not bound to attend to the uncertain movements of every assemblage of roving cattle by which our railways are infested. *Philadelphia & Reading R. R. vs. Hummell*, 44 Pa., 378. 8. Even where a railroad company, in purchasing the right of way, contracted with the owner of the land to fence the portion of the road through it, and did not comply with such contract, yet such owner is guilty of contributory negligence in allowing his cattle to roam upon the road where they had no right to wander, and cannot recover for their loss in an action against the company. On the company's failure to erect a fence, and in anticipation of damage, it was the plaintiff's duty to make an effort to compel the company to fulfil its contract, instead of attempting to

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make it liable for remote consequences. *Drake vs. Philadelphia & Erie R. R.*, 51 Pa., 240. 9. Every English railway is fenced, not to protect it from cattle, for none are at large, but to prevent detriment or detention from other cause. In a country so new and sparse as ours, the cost of fencing them would be too great to be borne. If an owner of cattle suffers them to run at large, it must be at the risk of losing them, or paying for their transgressions. The very act of turning them loose is a negligence except as to waste fields and forests. *Railroad Co. vs. Skinner*, 19 Pa., 298. 10. A railway company having the right to cut through the street of a city, though not bound by its charter to put up barriers for the protection of travelers upon the street, is liable for the neglect of those in its employ to put up the barriers at night which it has voluntarily placed there for safety. *Pittsburg & Fort Wayne R. R. vs. Gilleland*, 56 Pa., 452.

VIII. NEGLECT TO REPAIR ROAD-BED. 1. A railroad company is bound to furnish a safe and sufficient roadway to its servants as well as others traveling over it. If the substructure of a road be suffered to lie until it has become rotten and unsafe, it is negligence of the company. *O'Donnell vs. Allegheny Valley R. R.*, 59 Pa., 239. 2. It is the duty of a railroad company to construct its works with proper skill and care, and with due regard to the features of the ground over which its road passes. An injury arising from unskillful construction must be left for future remedy. Negligence or carelessness in executing work on their road is a tort, for which an action at law will lie. The company is bound to employ the engineering knowledge and skill ordinarily known and practiced in such works. *Pittsburg & Fort Wayne R. R. vs. Gilleland*, 56 Pa., 445. 3. The duty to keep a road in repair is a condition attendant upon the grant of the franchise. The right of action accrues to whoever is injured in person or property by the negligence of the company. The owner of a car, placed upon the railroad under a contract or license, may recover damages for injury caused by the bad condition of the road. The rule of liability for neglect should be most stringently enforced

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against railroad corporations, whose slightest inattention to the duties assumed frequently is attended with most frightful results. *R. R. Co., vs. Hughes*, 11 Pa., 141. 4. Where, as the result of a storm, a landslide took place, the *debris* from which covered a railroad track, causing the subsequent derailment of a train containing barrels of crude oil, which ignited and was carried by the current of an adjacent stream, burning a building several hundred feet distant, the court held, that the negligence of the company, if it existed, was the remote and not the proximate cause of the injury to the building. *Hoag vs. Lake Shore R. R.*, 85 Pa., 293. 5. A railroad company, in constructing its road and works, is bound to engage the engineering knowledge and skill ordinarily known and practiced in such works. *Baltimore & Ohio R. R. vs. School District*, 96 Pa., 65. 6. A brakeman is not necessarily bound to know the unsafe condition of the track at a certain point. It is not in the line of his duty to see to the track, especially where the defect is not a palpable one. *Penna. R. R. vs. Zink*, 126 Pa., 288. 7. Where a car was overturned by a defective rail, and a passenger injured, the case is for the jury, where there is evidence that the rail had been badly cracked at this point for a considerable time, and that it had been used for ten years and looked worn. *Dampman vs. R. R.*, 166 Pa., 520. 8. Where the superintendent and foreman of a railroad company have been notified of the dangerous condition of a siding, and have neglected to comply with their promise to repair, the company is liable in damages for an injury to a conductor of one of its freight trains, which ran off the track owing to its defective condition. If a master subjects his servants to dangers such as he ought to provide against, he is liable for any accident resulting from them. *Patterson vs. Pittsburg R. R.*, 76 Pa., 389. 9. Where the track at a railroad was in an insecure condition, resulting in a horse's foot being caught in the space between the plank and the rail, and the crushing of his leg by a passing train, held, that the question of negligence should have been submitted to a jury. *Baughman vs. R. R.*, 92 Pa.,

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335. 10. There is no duty on the part of a railroad company to ballast its tracks for the safety of its employees, and except, perhaps, at a crossing, no such duty to the public. *Philadelphia & Reading R. R. vs. Schertle*, 97 Pa., 451. 11. In an action against a railroad company for the death of an engineer, a fireman is not a competent witness to testify, as an expert, to the necessity of a safety switch at the place of injury. *Ballard vs. R. R.*, 126 Pa., 141. 12. Where an accident occurs by the washing away of an embankment of a railroad because of insufficient drainage, the company will not be relieved of liability by the fact that the road was constructed by a competent engineer, and that the drainage had been provided for in a manner approved by him. The fact that the defendant is the lessee of the road, does not relieve it from the consequences of its own negligence; and it was bound to see that the road was safe and sufficient between the points named on the passenger's ticket. *Philadelphia & Reading R. R. vs. Anderson*, 94 Pa., 351.

IX. NEGLECT TO CONSTRUCT CULVERTS AND CROSSINGS.

1. There is no liability on a railroad company for not constructing a culvert so as to pass extraordinary floods. It is sufficient, if the culvert be constructed to vent the ordinary high water of an obstructed stream. Unexpected visitations, resulting from extraordinary floods, must be laid to the account of Providence. *Pittsburg & Fort Wayne R. R. vs. Gilleland*, 56 Pa., 445. 2. In the construction of a railroad, in awarding damages the jury may consider the interference of the road with crossings already established, and damage sustained by the plaintiff thereby, as also from the failure or neglect of the company to construct the crossings as required by law, but not for the expense of the plaintiff in making the crossings himself. *East Penna. R. R. vs. Hiestor*, 40 Pa., 53.

X. NEGLECT TO REPAIR BRIDGES. 1. Where, in repairing a bridge over the tracks of a railroad, workmen had omitted to close an opening in the floor of the structure, through which person fell and was killed, held, that it was proper to submit a

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the case to the jury, inasmuch as the bridge at the time was open to all travelers. *Gilmore vs. R. R.*, 154 Pa., 375.

2. The Pennsylvania Railroad Company is liable for damages resulting from the unsafe condition of a bridge built by the state, which conducts a public highway across the railroad of the company. *Johnson vs. R. R.*, 2 Chester Co., 315.

3. Where a railroad appropriates a part of a public road, and builds a bridge over its road-bed, the railroad and the township are independent parties, each charged with a duty to the public, involving liability to an individual specially injured by a neglect of such duty. Neither can escape liability by alleging the primary liability of the other. If a railroad is charged with the duty of maintaining the approaches to a bridge, it is the party ultimately liable. *Gates vs. R. R.*, 150 Pa., 50.

XI. NEGLIGENCE IN LOCATING SCALES. In an action for death by negligence from cars striking a cart on scales near to a railroad track, evidence was proper, that after the accident the track was removed to a greater distance. If the track was too near the scales, a higher degree of care was necessary. When there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence. What is negligence is always a question for the jury, when the measure of duty is ordinary and reasonable care. *West Chester R. R. vs. McElwee*, 67 Pa., 311.

XII. NEGLIGENCE OF SPARKS FROM ENGINE. 1. In determining accountability for the consequences of a wrongful act, the immediate and not the remote cause is to be considered. Through negligence, a house near a railroad was fired by sparks from a locomotive. The fire was communicated from the building to another structure at some distance from it, which was consumed with all its contents. Held, that the railroad company was not liable for damages for the last building and its contents, though liable for the value of the building adjacent to the tracks which was destroyed from the negligence of the company's agents in the use of the engine. The person committing the first act of negligence is not liable for all its conse-

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quences. *Penna. R. R. vs. Kerr*, 62 Pa., 353. 18 **Pittsburg Journal**, 17. 2. Sparks from a locomotive set fire to a car, from which it was communicated to an oil-tank and destroyed an oil refinery. The court could not rule as a matter of law, that the plaintiff was guilty of contributory negligence in erecting an oil refinery near a railroad. Under the evidence, the questions of negligence and of proximate and remote cause were properly submitted to the jury. *Confer vs. R. R.*, 146 Pa., 31. 3. Where a building is destroyed by fire communicated not directly by the defendant railroad company, but by another building or grass negligently fired by sparks from the engine, the consequences are too remote to render it liable, without respect to the distance or other circumstances which rendered the burning probable. *Hoopes vs. R. R.*, 2 Chester Co., 106. 4. Through the negligence of a railroad company, cut dry grass was allowed to remain on its roadway. This grass caught fire from the sparks of a passing engine, and the fire was carried by the dry hay to a neighboring fence, and thence across two fields of hay until it reached and partly destroyed woodland six hundred feet distant. The jury held, that the facts constituted a continuous succession of events, the natural consequence of the primary cause. *Penna. R. R. vs. Hope*, 80 Pa., 377. *Lehigh Valley R. R. vs. McKeen*, 90 Pa., 122. 5. Where the owner of an ice house leaves shavings about his building in such a careless manner as to be readily set on fire by sparks from an engine in the vicinity, resulting in the destruction of his building, he is guilty of contributory negligence. *Kennebec Ice Co. vs. R. R.*, 14 W. N., 554. 6. Where a building used for the storage of straw, and located ninety feet from a railroad, was fired by sparks from a passing locomotive, it was properly left to the jury to determine whether the negligence of the railroad company in allowing the escape of large sparks from the locomotive, was the remote or proximate cause of the injury. *Penna. & N. Y. Canal Co. vs. Lacey*, 89 Pa., 458. 7. Where a lumberman has placed piles of lumber near a railroad track, in order that it may be ready

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for shipment when required, and as cars were furnished, he is guilty of contributory negligence, and cannot recover for the destruction of lumber by fire resulting from sparks emitted from a passing locomotive. *Post vs. R. R.*, 108 Pa., 585.

8. In an action against a railroad company for burning a barn by sparks from engines, there was evidence that the fire commenced near the railroad track, and that engines had passed shortly before the barn was fired, raising the presumption that it was fired by sparks from an engine, the particular one not being known. Held, that evidence from strangers that it was a common occurrence for engines to set fire to structures some distance from the track, was admissible. *Pa. R. R. vs. Stranahan*, 79 Pa., 405.

9. The use of any ordinary fuel to make steam in engines on a railroad is legal; the limit on its use is that the latest improvements in its management in practical use should be applied to it. It is the duty of a railroad company, in the use of an engine, to use such precaution as might reasonably prevent damage to others, and failure to do so is negligence. Where an engine is used on the road without a "spark-catcher," and an adjacent building is fired while the engine is passing, it is proper to submit the question of negligence to the jury, even if there be no direct evidence that sparks at the time had been emitted from the engine.

Lackawanna R. R. vs. Doak, 52 Pa., 379. 10. A railroad company is liable at common law for the damage done by fire occasioned by the negligent management of its locomotive engines. Negligence may be inferred from the fact that the engine threw out large sparks. Where lumber was burnt by sparks from an engine, separate actions against the railroad company cannot be maintained by both the owner and an insurance company which paid part of the loss. *Phila. & Trenton R. R. vs. Rogers*, 2 Walker, 278. *Phila. & Reading R. R. vs. Kerst, Idem*, 480. *Post vs. R. R., Idem*, 464.

11. In an action for a loss by fire, caused by sparks from a locomotive, the burden is on the plaintiff to prove that the fire was communicated by some engine of the defendant company,

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and also to prove negligence in the construction and management of the engine. Testimony as to defects in other engines of the company is inadmissible, unless the offending engine is not satisfactorily identified, in which case, in proof of defendant's negligence, the plaintiff may show that the defendant's locomotives generally, or many of them, threw sparks of unusual size, causing numerous fires in the vicinity. All engines, whether provided with spark-arresters or not, emit sparks, and the mere existence of a fire along the road, caused by sparks from the company's engines, is not enough to fasten upon the company the charge of negligence or want of skill. The absence of a spark-arrester is *prima facie* evidence of negligence, as it is the duty of railroad companies to adopt the best precautions against danger in general use. *Henderson vs. R. R.*, 144 Pa., 461. 12. The emission of sparks from the stack of a locomotive is not in itself illegal, and the loss of property adjacent to a railroad from the sparks apart from misuse, is *damnum absque injuriâ*. It is the duty of railroads running their engines close to buildings, to use the utmost vigilance and foresight to avoid injury. They should control their engines carefully, adopt every known safeguard, and avail themselves of every approved invention by the use of spark-catchers to lessen their danger. Negligence is the absence of care under the circumstances. *Frankford Turnpike Co. vs. R. R.*, 54 Pa., 345. 13. In an action against a railroad company to recover damages for the burning of plaintiff's barn, alleged to have been caused by sparks from a locomotive, the question was whether the spark-arresters in use were up to the standard required of the company. The fact that the plaintiff held an insurance policy on the barn had no place in the evidence, and made no difference. *Penna. R. R. vs. Page*, 21 W. N., 52. 35 *Pittsburg Journal*, 511. 14. The fact that an engine emits fire and throws coals along its way is evidence from which a jury may infer that it fired a house which was burned, and also that the spark-arrester was imperfect. *Penna. Co. vs. Watson*, 18x Pa., 293. 15. Using a dangerous agent, the law requires of

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a railroad company, that they adopt suitable precautions to prevent damage to the property of others. They have no right to run their locomotives without it. A fire, caused by running the engine without any evidence of precaution, is a *prima facie* case of negligence. *McCully vs. Clarke*, 40 Pa., 408. 16. In the absence of evidence to show that the locomotive from which fences, hay and grass caught fire was improperly constructed, and had not an approved spark-arrester, the court should direct a verdict for defendant in an action to recover damages for the loss thereby occasioned. The fact that the fire thus took place, is not *prima facie* evidence that the spark-arrester was defective. If reasonable precautions are taken in providing proper appliances to locomotives to prevent damage by fire, the company is not liable, though it fires every rod of the country through which its trains run. *Jennings vs. R. R.*, 93 Pa., 337. *Phila. & Reading R. R. vs. Schultz*, *Idem*, 341. *Reading & Columbia R. R. vs. Latshaw*, *Idem*, 449. 17. The rule is well settled, that a party is not answerable in damages for the reasonable exercise of a right, unless upon proof of negligence, unskillfulness or malice. Buildings were burned by sparks from a locomotive engine; in a suit against the company by the owner, it was shown that the spark-arrester on the locomotive was apparently perfect in mechanical construction, and in efficient condition at the time of the fire, and there being no evidence to justify an inference of negligence, it was held, that the jury should have been instructed to find for the defendants. *Phila. & Reading R. R. vs. Yerger*, 73 Pa., 121. 18. Where there is no direct proof that a building near a railroad was set on fire by sparks from a locomotive, whether it was so set on fire depends on circumstances, and therefore is for the jury. The owner of a property near a railroad must take all risks of a proper and careful use of the road. When a railroad company uses the most approved spark-arresters, and proper care and vigilance in running their engines, an adjacent land-owner has no remedy for injury to his property by fire thrown from a locomotive. *Phila.*

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& Reading R. R. vs. Henderson, 80 Pa., 182. 19. If the engine was properly constructed as to its furnace and smokestack, and was furnished with a spark-arresting grate of the proper character, the company would not be liable, though a neighboring building was burned by fire accidentally occasioned by sparks issuing from the engine. All evidence going to prove defects in other engines of the company, other than the one alleged to have produced the injury complained of, is irrelevant. *Erie Railway Co. vs. Decker*, 78 Pa., 293. 20. The firing of one's woods by sparks from a locomotive is not in itself evidence, from which negligence in managing the fires of the engines can be inferred. A party is not answerable in damages for the reasonable exercise of a right, unless on proof of negligence, unskillfulness or malice in the exercise of that right. *R. R. Co. vs. Yeiser*, 8 Pa., 366. *Huyett vs. R. R.*, 23 Pa., 374. *R. R. vs. Hummell*, 27 Pa., 103. But see *R. R. vs. Lazarus*, 28 Pa., 203. 21. In an action against a railroad company to recover damages for a loss of plaintiff's property by fire alleged to have been caused by negligence in permitting sparks to escape from an engine, the burden is on the plaintiff to prove the negligence. *Albert vs. R. R.*, 98 Pa., 316. 22. If a suit be brought against a railroad company for the negligent burning of a building, a subsequent action cannot be maintained for the burning of the contents of the same building, resulting from the same negligent act. Where damages are claimed, resulting from the tortuous act of another, the law will not permit it to be divided into distinct demands, and made the subject of separate actions. *Lacey vs. Canal & R. R. Co.*, 1 Kulp, 335. *Erie R. R. vs. Decker*, 1 W. N., 308. 23. Railroad companies are liable at common law for damage done by fire, occasioned by the negligent management of their locomotives; and for the risk of such damage no compensation can be allowed at the taking of the land for the construction of the road. For injury accruing to an individual by the proper and ordinary use of a railroad, no damages can be recovered.

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R. R. vs. Hummell, 27 Pa., 99. *R. R. vs. Lazarus*, 28 Pa., 203.

XIII. NEGLIGENCE, BY FRIGHTENING HORSES. 1. Negligence is the absence of care, according to the circumstances. It is the duty of an engineer approaching a highway, if danger is to be apprehended, to give warning by sounding the whistle or other sufficient alarm, but a wanton, unnecessary sounding of the whistle is negligence. One driving an unbroken or vicious horse, or one easily frightened by a locomotive, along a public road running side by side with a railroad, does so at his own peril. What would be due care in running a train through a sparsely-settled rural district might be negligence in approaching a large city. *Philadelphia, Wilmington & Baltimore R. R. vs. Stinger*, 78 Pa., 221. 2. Sounding the whistle under a bridge as a traveler was passing over, which caused the horses to run away through fright and injure him, was a sufficient proximate cause of injury to create a liability on the company. *Penna. R. R. vs. Barnett*, 59 Pa., 259. 3. A railroad company is not liable for damages resulting from the ordinary lawful use of its road. Where a locomotive was standing on a track alongside of a public road, and as the driver of a vehicle approached allowed steam to escape whereby the horse was frightened and the vehicle upset and its occupant injured, there was no proof of negligence or malicious intent on the part of the engineer, and there could be no recovery. *Drayton vs. R. R.*, 10 W. N., 55. *Gerard vs. R. R.*, 5 W. N., 251. 4. A railroad company is not liable for damages resulting from the ordinary, legitimate and lawful use of their road. The fact that a horse, while being driven on a country road parallel with the tracks of a railroad became frightened by the noise of escaping steam from a locomotive, ran off and was injured, is no proof of the company's negligence. *Drayton vs. R. R.*, 28 *Pittsburg Journal*, 444. 5. In an action against a railway company to recover damage to a horse and wagon, where there was proof that the defendant's engineer, on a dummy engine, sounded the whistle in an unusual manner, frightening

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the horse and causing injury, it was proper to submit the case to the jury. *Lott vs. R. R.*, 159 Pa., 471. 6. It is not negligence for a watchman at a railroad crossing to run with a flag in front of a horse and carriage, approaching on a highway, to arrest the progress of the vehicle and prevent its inevitable destruction, even if as a result the horse becomes frightened and overturns the carriage. *Floyd vs. R. R.*, 162 Pa., 9. 7. Where no defect of construction in a railroad bridge crossing a city street is shown, the company is not responsible for injuries resulting from the frightening of horses by the operation of its road over the bridge, without negligence and without malice. *Ryan vs. R. R.*, 132 Pa., 304. 8. It is not an obstruction of access to a property abutting on a street where there is an overhead railroad, that persons with vehicles might be deterred from approaching the property from fear that their horses would be frightened by the trains above them. *Jones vs. R. R.*, 151 Pa., 31. *Penna. Co. vs. R. R.*, *Idem*, 334. 9. A part of a railroad company's track was built upon a public street in a built-up portion of a city, and was crossed at grade by numerous streets. A horse was frightened by the bell of an engine and was struck, and his driver injured. The company afterwards enclosed its track with a fence. The fact of this subsequent protection did not prove the defendants had been guilty of previous negligence in omitting to enclose the track. *Fouhy vs. R. R.*, 17 W. N., 177. 10. An engineer of a railroad company running his engine through a city sounded his whistle in violation of the rules of the company, and apparently for the purpose of frightening a horse on the street. The horse took fright and injured a passer-by. The jury found the sounding of the whistle was the proximate cause of the injury, and held the company liable in damages. *Phila. & Wilmington R. R. vs. Brannen*, 17 W. N., 227. 11. Where the driver of a horse approached a railroad crossing at night, and his horse was frightened by an advancing train and dashed into the engine, killing itself and demolishing a buggy, held, that the plaintiff's loss were the

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result of a pure accident which the railroad company could not have prevented. *Miller vs. R. R.*, 11 W. N., 369.

12. A runaway horse crossed the railroad in front of a train on a wagon road which had three outlets. The engineer was not bound to stop the train because the horse might take the road which recrossed the track. *Watson vs. R. R.*, 2 Walker, 456. 13. A party acting under the directions of the company's agent is not guilty of contributory negligence. In the present case, relying on the statement of the freight agent at the railroad station that no train would pass for a half an hour, the plaintiff drove a fractious horse up to the door of the station. In five minutes a train passed at a high rate of speed, frightened the horse, resulting in its injury by the car wheels. Held, that the plaintiff was entitled to damages. *Allegheny Valley R. R. vs. Findley*, 4 W. N., 438.

XIV. NEGLECT IN SHIFTING CARS. 1. Where a freight car loaded with oil was detached from the train by an employee of a railroad company, resulting in it descending a steep grade and colliding with a locomotive, which set fire to the cars and burned a neighboring house, held, that as between the company and third persons the company was liable for the negligence of its servant. *Oil City R. R. vs. Keighron*, 74 Pa., 316. 2. Where a lumber car was standing on a siding, from which under the rules of the company it should have been removed, as it had a defective brake and was not sufficiently blocked, and a freight train was shifted from the main track to the siding, striking the lumber car with force and crushing an adjacent warehouse and its occupant, the question of negligence was properly left to the jury. *North Penna. R. R. vs. Kirk*, 90 Pa., 15. 3. Where, contrary to the rules of the company, its agents attached a freight car to a passenger train, on the owner of the freight car assuming all risks, it was held, that the company could not repudiate the acts of its agents so as to free itself from responsibility for negligence. The owner assumed only the risk of attaching his car; not the risk of the negligence of the company's agents, which resulted in the

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destruction of the contents of the freight car. *Lackawanna R. R. vs. Chenewith*, 52 Pa., 382.

XV. NEGLECT TO STOP, LOOK AND LISTEN. 1. The rule which requires of one who is about to cross the track of a railroad, that he shall stop and look both ways before stepping on the track, is a wise and salutary rule. If observed in every instance, accidents at such crossings would be almost impossible. The penalty of contributory negligence should be rigidly visited on those who disregard it. The safety of passing trains and the lives of passengers therein are of as much consequence as the lives of those who may be crossing the tracks. *Phila. & Reading R. R. vs. Carr*, 99 Pa., 505. *Schum vs. R. R.*, 1 Lancaster Review, 13. *Pittsburg R. R. vs. Dunn*, 56 Pa., 280. *Lehigh Valley R. R. vs. Hall*, 61 Pa., 368. *Penna. Canal Co. vs. Bentley*, 66 Pa., 33. 2. The rule that a traveler approaching a railroad crossing must stop, look and listen, is imperative. If he disregards it, the presumption of negligence on his part is one *juris et de jure*. If one complies with the rule and sees or hears an approaching train, he must wait for it to pass. If he cross before the train, unless compelled by an imperious necessity, his negligence is a presumption of law. *Myers vs. R. R.*, 150 Pa., 386. 3. The rule requiring one about to cross the tracks of a railroad company, to stop, look and listen for an approaching train is a clear and certain rule of duty, and a failure to observe it is more than evidence of negligence, it is negligence of itself. The rule is applicable as to railroad crossings in cities and in towns, as well as to crossings in the open country, and whether safety gates are maintained at street crossings or not. *Greenwood vs. R. R.*, 124 Pa., 572. 4. It is a rule, that one approaching a railroad crossing upon a public highway must stop, look and listen at a convenient distance from the track before venturing upon it. Failure to do this is negligence which will prevent a recovery. Where a person is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop, look and listen, he must be con-

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clusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into obvious danger. In this case, the jury were sent to view the premises at the request of the defendant. *Myers vs. R. R.*, 150 Pa., 386. *Holden vs. R. R.*, 7 Kulp, 52. *Penna. R. R. vs. Werner*, 6 W. N., 520. *Penna. R. R. vs. Peters*, 116 Pa., 216. *Schultz vs. R. R.*, 2 W. N., 585.

5. At the place of intersection of a highway with a railroad, there are concurrent rights. Neither the traveler on the highway nor the railroad company has an exclusive right of passage. Even on a common road, travelers must look out for the approach of other vehicles. This is the more necessary at a railroad crossing, because movement upon such road is more speedy, and the consequences of a collision usually more disastrous. Precaution, looking out for danger, is therefore a duty. The traveler is bound to stop and look out for trains, and not rush heedlessly, or remain unnecessarily in such a dangerous position. *North Penna. R. R. vs. Heileman*, 49 Pa., 64.

6. If a traveler in crossing a railroad is injured either by his own misfortune or fault, the company is not liable. Where a traveler is injured crossing a railroad on a public road, negligence is not to be presumed against the company. The traveler is bound to approach the railroad cautiously, and to observe the approach of trains, and the company to give proper and timely warning of their coming. The fact that the horse of the traveler became unmanageable at the crossing, and occasioned an accident, will not necessarily render the company liable. *Penna. R. R. vs. Goodman*, 62 Pa., 329.

7. At railroad crossings there are reciprocal duties. Both the company and the public have a right of way; neither is exclusive. It is the duty of each so to exercise their respective rights as not to interfere unnecessarily with the rights of the other. A crossing is a known place of danger. The engineer must approach it at a moderate rate of speed; the citizen must look for the train and avoid it. The train is not obliged to stop; he is. *Moore vs. R. R.*, 108 Pa., 353. *Penna. R. R. vs. Gar-*

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vey, Idem, 369. 8. It is the imperative duty of the traveler to stop, look and listen for approaching trains before attempting to cross the railroad track. If he neglects this duty, or knowingly attempts to cross in front of a rapidly-moving train, he takes his life in his own hands and assumes the risk of personal injury. *Lehigh Valley R. R. vs. Brandtmaier*, 113 Pa., 610. 9. Failure on the part of a traveler crossing a railroad track at grade to stop, look and listen is not merely evidence of negligence, but negligence *per se*, and a question for the court. *Penna. R. R. vs. Beale*, 73 Pa., 509. *Reading & Columbia R. R. vs. Ritchie*, 102 Pa., 425. 10. It is not sufficient to merely slacken speed. Failure to stop is negligence *per se*, and is a question for the court. *Stanton vs. Canal Co.*, 1 Lackawanna Jurist, 245. 11. One who is riding by invitation in a vehicle in charge of another, with knowledge that it is approaching at a fast rate a crossing where a train may be expected, without keeping any lookout himself, and without any request to the driver to stop, is guilty of negligence. *Dean vs. R. R.*, 129 Pa., 514. 12. The mere act of stopping before attempting to cross a railroad track does not of itself show that the person injured stopped at a proper place, or that the duty of looking and listening was performed with proper care and attention; but stopping is opposed to the idea of negligence. *Ely vs. R. R.*, 158 Pa., 233. 13. Where a person walking on a public street comes to a railroad crossing while a train is passing on the further track, and before it has completely passed starts to cross the nearer track, and is struck by a train thereon, he is guilty of contributory negligence. *Schmidt vs. R. R.*, 149 Pa., 357. 14. A train approaching the crossing of a highway at a rapid rate of speed gave no signal. A young woman, with good eyesight, but defective hearing, stopped about two feet from the outside rail, and then attempted to cross. Just as she reached the second track, she was struck by the engine and injured. The evidence was conflicting as to the speed of the train, and as to what distance it could be seen from the

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point where the plaintiff stopped. The case was for the jury. *Arnold vs. R. R.*, 161 Pa., 1. 15. In an action against a railroad company to recover damages for the death of a person at a grade crossing, the evidence of the plaintiff showed that the deceased just before attempting to cross the track, could have had an unobstructed view of the railroad for a distance of nine hundred feet in the direction from which the train came which struck her. A compulsory nonsuit was rightly granted. *Lees vs. R. R.*, 154 Pa., 46. 16. A railroad train having stopped near the crossing of a highway, the trainmen beckoned a traveler to drive his horse across the tracks. As he passed in front of the cars, a noise was made in shifting a car brake, the horse was frightened and upset the wagon. Held, in an action for damages, the question of the railroad company's negligence was for the jury. *Penna. R. R. vs. Horst*, 16 W. N., 567. 17. It is not always contributory negligence, *per se*, for a person to attempt to cross a railroad track without waiting until a train, which has just passed, has gone so far as to leave unobstructed the view of another train approaching upon a parallel track in another direction. In the present case, the plaintiff stumbled and fell upon the track, and this misfortune rather than lack of time to get across the track occasioned the accident. *Phila. & Reading R. R. vs. Carr*, 99 Pa., 505. 18. Where one walking on a public highway attempts to cross the tracks of a railroad in front of an approaching train, and the flagman at the crossing attempts forcibly to stop him, but he breaks away, jumps in front of the train and is killed, the question whether the accident was caused by the flagman, and whether the flagman's action was justified, will not be submitted to the jury. *Oberdorfer vs. R. R.*, 149 Pa., 6. 19. The rule that requires a traveler to stop, look and listen before crossing a railroad track is imperative. The fact that there is a flagman at the crossing does not dispense with the rule, even when the flagman beckons the traveler to cross. *Burd vs. R. R.*, 25 W. N., 250. 20. It is negligence, *per se*, for a

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traveler to drive upon a railroad track without stopping, looking and listening. The fact that safety gates exist at the crossing does not relieve him from this duty. *Greenwood vs. R. R.*, 3 Delaware Co., 534. 21. The rule that a traveler about crossing a railroad track must stop, look and listen is not varied by the fact that such crossing is upon a street within the limits of a city. *Schultz vs. R. R.*, 6 W. N., 69. 22. Even when a train of cars is behind time and neglects to blow the whistle when approaching a road crossing, yet it was contributory negligence in a lad of sixteen to attempt to cross the track without looking along it, where it was unobstructed for a long distance, and he could readily have seen the headlight of an approaching locomotive. He was guilty of contributory negligence. *Anderson vs. Penna. R. R.*, 4 W. N., 274. 23. In crossing a railroad track, a higher degree of care is exacted where a train is approaching than where it is stationary and without any engine attached. *Allegheny Valley R. R. vs. Offord*, 32 *Pittsburg Journal*, 139. 24. If a man, in crossing one track in the rear of a train is run over by a train approaching on a second track and has placed himself, without negligence, in a position of danger, he is not responsible if he makes a mistake of judgment in his attempts to extricate himself. *Penna. R. R. vs. Werner*, 89 Pa., 59. 25. One who approached a railroad, muffled in his coat, within the covered top of his wagon, taking no notice of the railroad, which he well knew from having repeatedly crossed it, and drove slowly upon the track, without stopping or looking out, is guilty of negligence. *Hanover R. R. vs. Coyle*, 55 Pa., 396. 26. Where a pedestrian, in attempting to pass along a sidewalk, where the railroad track leading into a yard crossed it, was struck by a coal car and killed, the fact that he had been warned of the danger by employees of the road stationed there for that purpose is for the jury, as evidence of his negligence in disregarding the warning. *North Pa. R. R. vs. Robinson*, 44 Pa., 175. 27. Where a person walking along a path on a dark night comes upon a railroad turn-out, and is struck by a

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train which he supposed would keep upon the main line, it is for the jury in an action by him against the company for the injury, to say whether he was guilty of contributory negligence. *Craven vs. R. R.*, 9 Pa. County, 157. 28. Where, in an action against a railroad company for negligence causing death, the undisputed testimony of the plaintiff shows, that the deceased was killed while attempting to cross the track in front of an approaching train which he could have seen, had he looked for it, it was not error to enter a compulsory nonsuit. *Blight vs. R. R.*, 143 Pa., 10. 29. Where the uncontradicted evidence for the plaintiff in an action against a railroad company is, that the deceased was killed while voluntarily attempting to cross in front of a moving train, the approach of which he had seen while in a place of safety, the court should nonsuit. *Aiken vs. R. R.*, 130 Pa., 380. 30. The rule, that before crossing a railroad track, a person must stop, look and listen, applies to persons walking equally as to persons driving. It is not a rule of evidence, but a peremptory rule of law, and a failure so to stop is not merely evidence of negligence, but negligence *per se*. *Aiken vs. R. R.*, 130 Pa., 380. 31. If a party at a railroad crossing sees or hears an approaching train, he must wait for it to pass. If he cross before the train, unless compelled by an imperious necessity, his negligence is a presumption of law. *Myers vs. R. R.*, 150 Pa., 386. 32. It is not necessary to prove affirmatively, that a person injured when crossing a railroad on a public highway had stopped and looked up and down the track; whether he used the proper precautions is to be determined by all the circumstances of the case. In an action against a railroad company for negligence in killing a man by their engine at the crossing of a public road, evidence that such road had been made by the company was irrelevant. *Penna. R. R. vs. Weber*, 72 Pa., 27. 33. It is in vain for a man to say that he looked and listened, if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive, and the injury received was

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attributable solely to his own gross carelessness. *Carroll vs. R. R.*, 2 Pennypacker, 159. 34. Where a person goes on the track of a railroad immediately in front of an approaching train at a point where nothing intervenes to obstruct his view, the court will say, as a matter of law, that he was guilty of negligence, notwithstanding his assertion that he stopped, looked and listened before he went upon the track. *Sheehan vs. R. R.*, 166 Pa., 354. 35. The instinct of self-preservation might be trusted to keep a traveler from getting in front of a train he knew was approaching. This is the reason of the rule, that one approaching the track of a railroad, with a view to cross it, must stop and look and listen. When his senses afford him the information, he acts upon it at his peril. *Ash vs. R. R.*, 148 Pa., 138. 36. Where the deceased under a mistaken belief that his train was about to start, ran across an intervening track in front of a moving train, without stopping to look and listen, and was struck and killed, it was not error to enter judgment of nonsuit. *Irey vs. R. R.*, 132 Pa., 563. 37. In an action against a railroad for personal injuries, the plaintiff is not entitled to recover, where it appears he walked directly up against a moving locomotive, which he must have seen or heard, had he stopped, looked and listened. No fog could be so dense that a large object like a locomotive could not be discerned at the instant before contact with it. The negative testimony of the plaintiff, that he heard no bell or whistle was contradicted by six witnesses who did hear the warning. *Hauser vs. R. R.*, 147 Pa., 440. 38. A pedestrian, while attempting to cross a railroad track at night, was struck and killed by a locomotive. His view was unobstructed; it did not appear whether or not he had stopped, looked and listened; the headlight of the locomotive was plainly visible, and the engine bell was rung. In view of these facts, a compulsory nonsuit was properly entered. *Kelly vs. R. R.*, 19 W. N., 400. 39. It is now a well-established rule that, even where the plaintiff does testify that he stopped, looked and listened, and neither saw nor heard an approaching train, and yet it struck him the moment he got

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upon the track, he cannot recover; because the fact of the immediate collision conclusively proves that he did not exercise his senses as to the approaching train. *Holden vs. R. R.*, 169 Pa., 1. *Connerton vs. Canal Co., Idem*, 339. 40. It is contributory negligence for a party to attempt to cross a railroad track directly in front of a moving locomotive. In the present case, a passenger on one train in alighting stepped off the train on the side where passengers were not accustomed to alight, although there was no station or platform on either side, and was injured by a passenger train on the other track. *Morgan vs. R. R.*, 23 W. N., 189. 41. A person, in crossing a railroad track, should look and see if a train is coming; if he does not, he cannot recover for an injury received, although the train that injured him was behind schedule time, and he was crossing the track to get on another train. *Anderson vs. R. R.*, 12 Phila., 369. 42. It is gross carelessness for a person to attempt to cross a railroad track in front of a moving train. It is in vain to say that he first looked and listened, if, in spite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive. *Marland vs. R. R.*, 123 Pa., 487. *McNeal vs. R. R.*, 131 Pa., 184. 43. In the absence of proof to the contrary, the presumption in law is that a prudent man in driving across a railroad track would do all that he could do under the circumstances to preserve his own life, and that he had stopped and looked and listened. The onus of proving contributory negligence in such case would be upon the railroad company. The fact that the horse the deceased was driving became frightened and unmanageable a short distance from the railroad, if the animal was a gentle one, and frightened through the negligence of the defendants, and being beyond the control of the deceased, rushed on the track, was an important element in the case. *Weiss vs. Penna. R. R.*, 79 Pa., 387. 44. The common law presumption is, that every man does his duty until the contrary is proved, and in the absence of all evidence on the subject, the presumption is that the decedent, losing his life by a collision while driving over

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a railroad track, observed the precautions which the law prescribes. *Schum vs. R. R.*, 1 *Lancaster Review*, 371. 45. Where a party attempted to cross the track of a railroad, the presumption is that he complied with the requirements of the law to stop, look and listen. In the absence of proof to the contrary, the law presumes this in his favor. The presumption of a fact in law which carries a case to a jury, necessarily leaves them in possession of the case. *Penna. R. R. vs. Weiss*, 87 Pa., 447. 46. Where a person is killed at a railroad crossing, and there is no evidence whether or not he stopped, looked and listened, the law presumes that he did. This is a presumption of fact, and may be rebutted. What constitutes negligence, in a given exigency, is generally a question for the jury and not for the court. Negligence is want of care under the circumstances; the standard is therefore necessarily variable. *Schum vs. R. R.*, 107 Pa., 8. 47. Before crossing a railroad, a traveler must stop, look and listen, and that a flagman is stationed at the crossing does not relieve the traveler of this duty. In the absence of evidence to the contrary, the presumption is that a party, before crossing a railroad, has observed the precautions which the law prescribes. *Crossman vs. R. R.*, 2 *Chester Co.*, 350. *Longenecker vs. R. R.*, 2 *Idem*, 340. *Schum vs. R. R.*, 2 *Idem*, 346. 48. The presumption in the absence of other evidence is that the traveler takes these precautions before crossing the tracks. In an action against a railroad company for injuring such traveler, the burden is on the defendants to disprove care, unless the plaintiff's own evidence shows contributory negligence. *Penna. R. R. vs. Weber*, 76 Pa., 157. 49. No presumption of negligence arises from the crossing of a track at a railroad station in order to take passage upon a train on another track, when that is the only way by which such train can be reached. *Kohler vs. R. R.*, 135 Pa., 346. 50. The failure to stop immediately before crossing a railroad track is negligence *per se*, and is a question for the court. It is error for the

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court to submit the question to the jury, whether if the deceased had stopped, could he have seen or heard the approaching train? *Penna. R. R. vs. Beale*, 21 **Pittsburg Journal**, 11. 51. In an action against a railroad company for a personal injury at a public crossing, a nonsuit should be entered, where plaintiff's evidence showed that she did not stop, look and listen before stepping on the first of four tracks, which had she done she would have seen the locomotive that struck her. If the evidence is conflicting as to the act of the person before attempting to cross the track, the case should go to the jury. *Smith vs. R. R.*, 160 **Pa.**, 117. *Hoffmeister vs. R. R.*, *Idem*, 568. *Keng vs. R. R.*, *Idem*, 644. 52. In an action to recover damages for injuries received at a grade crossing, if the fact is undisputed that the plaintiff did not stop at a proper place to look and listen, it is the duty of the court to declare the law; but if the facts are disputed, the question is for the jury. *Whitman vs. R. R.*, 156 **Pa.**, 175. 53. Where the evidence was contradictory as to whether a party, who was killed at a railroad crossing, stopped and looked and listened before attempting to cross, the court erred in stating to the jury as a fact that he did take these precautions. Where a judge states the evidence in two ways, one in favor of a corporation, and the other against it, a jury may be depended upon to adopt the latter. *Steinbrunner vs. R. W. Co.*, 146 **Pa.**, 513. 54. While the rule to stop, look and listen may be properly declared by the court as a matter of law, yet the question whether a traveler in a given case has stopped at the best place, is necessarily a question of fact; and must be passed upon by a jury. *Ellis vs. R. R.*, 138 **Pa.**, 522. 55. It is for the jury to determine, whether the driver of a vehicle in crossing railroad tracks stopped at a suitable place to look and listen for approaching trains; also whether intervening objects either wholly or partially obstructed the view. *Philadelphia & Reading R. R.*, 3 **Pennypacker**, 443. 56. It is a question for a jury to determine, whether if a plaintiff in an action against a railroad for damages for personal

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injury, stopped and looked and listened at a point near the crossing, as alleged by him, could possibly have avoided both seeing and hearing an approaching train. *Groner vs. Canal Co.*, 153 Pa., 390. 57. In an action for damages for injuries received at a grade crossing, the question whether plaintiff stopped at a proper place, for the purpose of obtaining a view along the tracks, is for the jury, where it appears that the view from the highway was obstructed. *Link vs. R. R.*, 165 Pa., 75. 58. Where a person is injured at a railroad crossing by the negligence of a railroad company, the question whether the plaintiff stopped at a proper point is for the jury, and not for the court. *Newhard vs. R. R.*, 153 Pa., 418. 59. To stop, look and listen before crossing a railroad track, is an imperative rule of law, to which there can be no exception. Where the attempt to cross is dangerous, imprudent or reckless, it is negligence, and a nonsuit must be entered in an action against the railroad company. If the view of the traveler be obstructed by a fixed object, or by a cloud of dust or smoke, he has no right to consider that there is no approaching train. He should wait to be assured that it is at a safe distance. *Beynon vs. R. R.*, 15 Pa. County, 186. 60. Where the driver of a team of horses on approaching a railroad track, a view of which, in one direction, was intercepted by the existence of a watch-house of the railroad, neglected to leave the wagon and look past the watch-house before attempting to cross the tracks, he was guilty of negligence, and no damages can be recovered for his death resulting from collision with a passing train. The erection of the watch-house in this position was not negligence, *per se*, and the question whether it was negligence to be so located, should go to the jury. *Central R. R. vs. Feller*, 84 Pa., 226. 61. The fact that a railroad track cannot be seen from the road, is no reason why the traveler should not stop, look and listen, approach the track at a slow walk, and if he has reason to fear from his horses taking fright, get out of his wagon and lead them by the head until he comes to a point from where he can be

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sure that it is safe to cross. The same strict rule cannot be held to a stranger to the country. A notice, "Look out for the locomotive," should be at a point where the approaching train can be seen in either direction; and, as to streets in a city, there should be a flagman at every crossing. *Penna. R. R. vs. Ackerman*, 74 Pa., 268. 62. Where an approach by a public road crossing railroad tracks is particularly dangerous, because the railroad from natural or other obstructions could not be seen, or the whistle heard, the duty of a traveler to stop is more obligatory than in other cases. If the traveler cannot see along the track by looking out from the carriage, he should get out and lead his horse. The failure to stop immediately before crossing a railroad track is negligence, *per se*, and this is for the court. The rule is unbending. *Penna. R. R., vs. Beale*, 73 Pa., 504. 63. The duty of a party about to cross the tracks of a railroad to stop, look and listen, is imperative, and the fact that the safety gates were raised at the crossing did not release the plaintiff from its observance. In the present case, the view was obstructed by the presence of box cars on the track, and a party driving a vehicle was struck and injured by a hand-car as he was attempting to cross the track. *Lake Shore R. R. vs. Frantz*, 127 Pa., 297. 64. When a railroad crossing is so constructed, that a traveler on the highway could not see the track in one direction until within eight feet of the track, the question whether such passenger has been guilty of contributory negligence should be submitted to the jury in a case where the traveler stopped his horse, listened, heard nothing, and looking at his watch saw that no regular train was due, and then drove on and was struck by an approaching special train, which had given no signals whatever. *McWilliams vs. Keim*, 22 W. N., 572. 65. While it is a question for a jury to determine, whether a traveler approaching a railroad crossing stopped at the best place to look and listen, it is negligence, to be declared by the court, to stop at a point where the traveler has but a limited view of an approaching train, and so far away from the crossing that the stopping can be of no possible benefit to him in

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passing over the crossing safely. Especially is this true, where a stop at a nearer distance from the crossing afforded an extensive view of approaching trains. *Newhard vs. R. R.*, 8 Montgomery Co., 101. 66. The plaintiff in this case testified, that a railroad crossing upon a public highway was blocked by freight trains standing, which detained him until they were separated. Seeing no approaching train, he started to cross the tracks, when he was struck by an unscheduled freight train passing very rapidly without sounding whistle or bell. Held, it was not error to refuse to instruct the jury to find for the defendant on the ground of the plaintiff's contributory negligence. *Bare vs. R. R.*, 135 Pa., 95. 67. Before crossing a railroad track, one is bound not only to stop, look and listen at a place where he can see, if possible, but, if familiar with the place, and his view be obstructed by a passing train, he should remain until his view of the track is clear, otherwise he is chargeable with contributory negligence. *Kraus vs. R. R.*, 139 Pa., 272. 68. Where the evidence in an action against a railroad company for damages showed, that the deceased did not stop at the proper place to look and listen for an approaching train, but a somewhat distant point, where her view was impeded, and then, without further stop, attempted to cross the track and was killed, held, that she was guilty of contributory negligence. *Derk vs. R. R.*, 164 Pa., 243. 69. A compulsory nonsuit was properly entered, where the plaintiff's evidence showed that in approaching a railroad crossing, she stopped about three hundred feet distant, and then proceeded to the crossing, passing without stopping a point fifty feet from the tracks where if she had looked she would have had an unobstructed view of the railroad for a long distance. *Plummer vs. R. R.*, 168 Pa., 62. *Gangawer vs. R. R.*, *Idem*, 265. *Beynon vs. R. R.*, *Idem*, 642. 70. A person about to cross a railroad must stop, look and listen for trains upon both tracks; and if his view is obstructed by a passing train, he should wait until it has passed before attempting to cross the other track. *Wilson vs. R. R.*, 5 Montgomery Co.,

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160. 71. While the law does not prescribe that in all cases a man must stop, look and listen before crossing the track of a private siding of a railroad, yet it does require he shall use ordinary care, and see if the siding is in actual use at the time he approaches it. *Ash vs. R. R.*, 148 Pa., 133. 72. The rule, that it is the duty of a person about to cross a railroad track to stop, look and listen, is not always applicable to passengers leaving a train and crossing the track, to reach the depot at the point of destination. It is the duty of the company to provide for the safe receiving and discharging of passengers. *Penna. R. R. vs. White*, 88 Pa., 327. 73. A nonsuit should be entered in an action for damages, where the testimony of the plaintiff showed that at the time of the action he went to a station to take the train, and under a mistaken belief that his own train was about to start, went across an intervening track without stopping to look or listen, and was struck and injured by the rear end of a backing train. *Foreman vs. R. R.*, 159 Pa., 541.

XVI. NEGLIGENCE IN CROSSING THE TRACKS. 1. A party lawfully crossing a railroad at grade with a drove of cattle, is not bound to give a signal to an approaching train, for he has a right to presume that the agents of a company would exercise reasonable care on their part in approaching a frequented road, on which droves of cattle were accustomed to travel. *Reeves vs. Del. & Lackawanna R. R.*, 30 Pa., 454. 2. It was contributory negligence for a cripple to leave a safe path along the sidewalk of a street in the night time and without a light, and walk diagonally over a railroad crossing, the condition of which he did not know, such act resulting in his stumbling among the rails and being injured. *Delaware & Lackawanna R. R. vs. Cadow*, 120 Pa., 559. 3. The act of attempting to drive a loaded cart across a railroad track at a point where the ground was soft, and without any planking or other means of surmounting the projecting rails, in consequence of which it became fast, and was struck by a train, is negligence. *Gramlich vs. R. R.*, 9 Phila., 78. 4. It was held to be contributory negligence on the part of a teamster who was hauling a load

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of 3500 pounds, to attempt to cross a railroad track at a time when he knew a train was due. In this case, the wheel of the wagon became fastened between the railroad tie and the rail, and was held there until struck by the train. *Gates vs. R. R.*, 6 Pa. County, 4. 5. Where a passenger on alighting from a train at a station, subsequently attempted to cross the track in front of the engine, the question of contributory negligence is for the jury. *Delaware & Lackawanna R. R. vs. Jones*, 128 Pa., 308. 6. To cross a railroad at any place other than on a public road is a trespass, and in case of injury damages could not be recovered from the company because of the rule of contributory negligence. *Upper Darby Road, In re*, 2 Montgomery Co., 188. 7. Unless a party crossing the track of a railroad be a traveler, he has no right to be there. If he is there unnecessarily, or wantonly, or for mischievous purposes, he has no claim for damages for injuries resulting from collision with a passing train. It was his duty to look and listen for an approaching locomotive and to place himself out of danger, and not to stop upon the track. It was the company's duty on approaching grade crossings, to give signals by a bell, a whistle, a headlight or a flagman, or other sufficient notice. If accident resulted from the negligence of both parties, neither could recover against the other. *Pittsburg, Fort Wayne R. R. vs. Evans*, 53 Pa., 250. 8. So long as a railroad company makes it safe for the public to cross its road on the public highway by gates, watchmen or other means, it may run its trains at any rate of speed over such crossings; but if it neglects to use every precaution necessary for the safety of the public, no slowness of speed will excuse its neglect. Negligence is want of ordinary care under the circumstances. No fixed rule of duty applicable to all cases can be established. *Penna. R. R. vs. Coon*, 11 Pa., 430. 9. It is the duty of a railroad company, in the running of its trains, to exercise care according to circumstances; and where the railroad track crosses a much traveled street or highway, the company as well as the public should exercise great care. It is the duty of the

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company to give some sufficient notice of the train's approach, and to moderate the speed of the train. On the other hand, it is the imperative duty of the traveler to stop, look and listen for approaching trains before attempting to cross the railroad track. *Lehigh Valley R. R. vs. Brandtmaier*, 113 Pa., 610. 10. Where the primary cause of an accident resulting from a collision between an engine of a railroad company and a team of horses at a grade crossing, was the omission of the company to station a watchman at the crossing, and a servant of the company, riding upon the engine, by reason of the collision, lost his life, the question of the company's negligence is for the jury to decide. *Rumsey vs. R. R.*, 6 Kulp, 359. 11. Negligence consists in the absence of that ordinary care which a party ought to observe under the particular circumstances in which he is placed. A different degree of care is required, where there is reason to apprehend danger, from that which is necessary where none is to be expected. A traveler crossing a railroad track at a regular crossing, has a right to expect notice by the blowing of a whistle of an approaching train. If by the negligence of the engineer his vigilance was allayed, the company cannot impute the consequence of their acts to his want of vigilance, a quality of which they deprive him. If their acts brought him within the boundaries of peril, they must answer for the results of that condition. *Penna. R. R. vs. Ogier*, 35 Pa., 60.

XVII. NEGLECT TO RING BELL OR BLOW WHISTLE. 1. It is a duty to give notice whenever danger may result to persons rightfully traveling on a public road that crosses a railroad, whether at grade or under or over the railroad, when danger would result from the want of notice. Negligence is always a question for the jury, when there is any doubt as to the facts or the inferences to be drawn from them. *Penna. R. R. vs. Barnett*, 59 Pa., 259. 2. A railroad company, in crossing a public street with its trains, is bound to exercise due care and prudence, in order that no injury may occur. In backing a train over such crossing, the bell should be rung or some per-

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son be stationed on the rear in order to give notice to persons passing. *Penna. Co. vs. Allen*, 3 *Pennypacker*, 173. 3. In an action against a railroad company for negligence, the evidence showed that the plaintiff while crossing the tracks on a dark and foggy night was struck by a locomotive, and that no bell had been rung or whistle blown. The jury awarded damages against the company, and a new trial was refused. *Hauser vs. R. R.*, 2 *Northampton Co.*, 389. 4. Where there is conflicting testimony as to whether a bell was rung or not before a train reached a grade crossing, one witness who hears its ringing is worth the testimony of a dozen witnesses who did not hear it, unless their attention had been in some manner called to it. The bell may be rung or the whistle blown, without attracting the attention of persons who are familiar with such sounds. *Urias vs. R. R.*, 152 *Pa.*, 324. 5. In an action for damages for personal injuries at a grade crossing, conflicting evidence as to the ringing of a bell or signal given as the train approached the crossing, is for the jury. Evidence in this case showed that plaintiff stopped, looked and listened, and that the night was dark and foggy. *Howett vs. R. R.*, 166 *Pa.*, 607. 6. In the present case an accident occurred at a crossing where there was no street opened, but a well-defined roadway led over a railroad, which had been recognized as a public crossing by the company who laid planking between the tracks. It was the duty of an engineer of a train to give a warning signal on the approach to such crossing, and the fact that it was rung on the days succeeding the accident, but not at the time of the accident, indicated a recognition upon defendants' part of the duty to ring it at such crossing and is admissible in evidence. *Specht vs. R. R.*, 24 *W. N.*, 317. 19 *Phila.*, 365. 7 *Pa. County*, 54. 7. If cars are moving at such a rate of speed that it would cover the distance between a point from which its bell could be heard at a crossing, in so short a time as to make the signal of little use to one in the act of crossing the track, then failure to give notice by the whistle from a longer distance would be negligence. *Childs vs. R. R.*, 150

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Pa., 73. 8. Whether the ringing of a locomotive bell, without blowing the whistle, is a sufficient warning of the approach of a train to a public road crossing, depends on the circumstances, of which generally in actions for negligence it is for the jury to judge. The ringing of a bell is not a proper substitute for the steam whistle, in the case of trains running at a high rate of speed over public crossings in rural districts.

Longenecker vs. R. R., 105 Pa., 328. 2 *Chester Co.*, 340.

9. The omission to ring the bell or blow the whistle of an engine to warn a stray mule of the approach of a train, is not negligence on the part of the company, of which the owner of the mule can avail himself in an action for the loss of the mule while it was trespassing on the track. *Fisher vs. R. R.*, 126 Pa., 294.

10. Where a footpath across a railroad track has been habitually used by the public for many years without objection, the railroad company owes the duty of reasonable care to those who use the crossing. Where an accident occurred at such location by a train running over a pedestrian, it is for the jury to consider whether any warning was given by the blowing of a whistle or the ringing of a bell. *Taylor vs. Canal Co.*, 113 Pa., 162.

11. Where a railroad company has so obstructed by cars a siding, that a traveller at a crossing cannot see the cars until he is directly on the track, the company should take extra precautions by having its employees blow a whistle and ring a bell continuously on the approach of a train. In the streets of a city, there should be a flagman at every crossing.

Penna. R. R. vs. Ackerman, 74 Pa., 268. 12. The unnecessary and extraordinary use of a railroad whistle is negligence. It is for the jury to say whether the whistle was blown in an unnecessary manner, and whether the accident was caused thereby. *Phila. & Reading R. R. vs. Killips*, 88 Pa., 405.

13. The employes of a railroad company, as to persons walking on the track, not at a crossing, are not bound to give any warning at starting. Blowing the whistle of the locomotive or making any other signal is not a duty owing to persons in the neighborhood, nor to trespassers on a railroad where the

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public has no right to be. *Phila. & Reading R. R. vs. Hummel*, 44 Pa., 378. *Gillis vs. Penna. R. R.*, 59 Pa., 142. 14. In an action against a railroad company by a widow and children for an injury causing death at the crossing of a public street in a city, it is not error to instruct the jury, that if the whistle of the engine was not blown, nor any other usual notice given of the approach of the train, the deceased had a right to presume that the track was clear, and if he used ordinary care, the defendants were liable for the consequences of his injury. The employees of a train were required to approach the crossing at a moderate rate of speed and to give timely warning to those lawfully passing along the street. *Phila. & Trenton R. R. vs. Hagan*, 47 Pa., 244. 15. It is the duty of those in charge of a train when approaching a public crossing to give sufficient notice by whistling, ringing the bell, or other warning of their approach to enable those on the track or crossing it to get out of danger, also to look along the track for obstructions, and to check the train promptly if such obstructions are seen. *Pittsburg R. R. vs. Dunn*, 56 Pa., 280. 16. When witnesses, in an action for negligence, testify that they did not hear the whistle or bell of a locomotive although they were giving particular attention and were listening for such signals, and would have heard them if given, their testimony is more than merely negative. *Quigley vs. Canal Co.*, 142 Pa., 388. 17. Even though proof be shown that a train approached a crossing at an unusual hour at a high rate of speed and blew no whistle, yet a party injured at such crossing by the train cannot recover damages, unless he stopped near the track and looked and listened. *Hoover vs. R. R.*, 8 Lancaster Review, 337. 18. Where a person crosses a railroad track by a common and well-known foot path, used by the public for many years, without objection by the railroad company, he cannot be regarded as a trespasser. In the present case, the engineer of a locomotive standing on the track near the footpath gave no warning of approaching cars detached from a freight train, which could not be readily seen

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by a pedestrian, and as a result a weak-minded girl of twelve years of age, in attempting to cross in front of the stationary locomotive, was struck by the freight cars on the other track. Held, that the company was liable in damages. *Phila. & Reading R. R. vs. Troutman*, 11 W. N., 452. *Clark vs. R. R.*, 5 W. N., 119.

XVIII. NEGLIGENCE IN RUNNING THE TRAINS. 1. A train at a street crossing about to start, is notice to the world that it should not be crossed, only when notice of starting has been given to the world. *Phila. & Baltimore R. R. vs. Laver*, 112 Pa., 414. 2. If a train is running after dark without a headlight, and without giving any warning of its approach, a jury could naturally infer that the death of a party crossing the tracks was occasioned by the recklessness of the company's agents, rather than from any want of care on his part in not observing it in time to avoid danger. It does not follow that there can be no recovery for his death, in the absence of direct and positive evidence that he observed the precautions to stop, look and listen. *Lehigh Valley R. R. vs. Hall*, 61 Pa., 368. 3. In this case, the plaintiff was injured at a railroad crossing by a train of freight cars backing over the crossing at a considerable rate of speed. No warning of its approach was given. There was neither person nor light upon the rear end car. Held, that the question of negligence was properly for the jury. *Fisher vs. R. R.*, 131 Pa., 292. 4. In the present case, the driver of a vehicle, on approaching a crossing of a railroad, and hearing a whistle in the distance, stopped and apparently listened. Knowing that the station was between him and the train, which he could hear, but owing to an intervening hill he could not see, and that trains, including the one then approaching, usually stopped at such station, he attempted to cross the track, and was struck by the engine and killed. Held, that the question of negligence in such case was for the jury, and it was error to direct judgment of nonsuit. *McNeal vs. R. R.*, 131 Pa., 184. 5. It must only be some public

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necessity of travel, that can justify an order of a railroad company as to the respective times of starting trains in the same direction very shortly after each other. This is especially so, where the view of the track is obstructed by curves and embankments. *Ryland vs. Peters*, 1 Phila., 264. 6. Where a man stopped at a railroad crossing, where the view was obstructed, until a train passed, and then not hearing anything, drove on, and was struck by some moving cars that had been detached from the train, he was not necessarily guilty of contributory negligence. *Williamsport R. R. vs. Weiss*, 2 Walker, 217. 7. Where the conductor of a freight train permitted it to stand on the crossing of a public street, and absented himself from it, while a teamster was removing the cars by means of horses attached, whereby a boy creeping under a car was run over and badly injured, the employers of the conductor are liable. *Rauch vs. Lloyd*, 31 Pa., 358.

XIX. NEGLECT TO ERECT SAFETY GATES. 1. Ordinances prohibiting railroad companies from running trains across streets without erecting safety gates and providing watchmen, are penal, and must be construed strictly. *Delaware & Hudson Canal Co. vs. Winton*, 2 Lackawanna Jurist, 210. But see *Archbald vs. Canal Co.*, 3 *Idem*, 189. 2. Where the posts of safety gates at a railroad crossing are set within the traveled roadway, they are an unlawful obstruction of the street, and the company is liable in damages for an accident caused thereby. *Greenwood vs. R. R.*, 5 York Record, 23. 4. *Delaware Co.*, 459. 8 Lancaster Review, 86. 3. Safety gates, when open, are an invitation to the traveler on the highway to cross, and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury. This rule, however, does not apply to a person who reaches the place of danger by walking along the railroad. In the present case, no signal was given by the train; the gates were not closed, and the watchman was in his box. *Matthews vs. R. R.*, 161 Pa., 28. 4. Where the gate shutting a railway off from travel is open, it is an invitation to the traveling public to come

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on, and an intimation to them that they may do so safely. *Conway vs. R. R.*, 17 Phila., 71. 5. Where, by a city ordinance, safety gates are erected at the intersections of streets and railroad tracks, it is negligence to leave them open on the approach even of a hand-car. The fact that they were open at such a time necessarily tended to mislead the plaintiff, although it was his duty in any event to stop, look and listen. *Lake Shore R. R. vs. Frantz*, 127 Pa., 297. 6. Where, at a public crossing, a railroad company has been in the habit of keeping a watchman to open and close a gate at the approach of trains, it is a question for the jury, whether the company is not chargeable with negligence in leaving the gate open and fastened back, and without a watchman. *Phila. & Reading R. R. vs. Killips*, 88 Pa., 405. 7. In this case, a lad of seventeen, on approaching the crossing of a railroad and seeing the gates down, stopped his wagon until a freight train passed. The gateman then threw open the gates and the wagon was driven on the tracks, where it was immediately struck by an express train coming in the opposite direction from that taken by the freight train, and which could not have been seen from the wagon before going on the track. The cause of the gateman's mistake was the fact that there was but one signal box for both tracks, and the signals from the two trains being almost simultaneous, he naturally believed but one train was approaching. The company was held liable in damages for the injury. *McGee vs. R. R.*, 33 W. N., 15. 8. Safety gates are a warning of the passing of trains, not only to vehicles, but to pedestrians; but if, in disregard thereof, a pedestrian in broad daylight pass a gate which is closed, attempt to cross the track, and, while watching one train, is killed by another coming in an opposite direction, he is guilty of contributory negligence. *Sheehan vs. R. R.*, 166 Pa., 354. 15 Delaware Co., 209. *Cleary vs. R. R.*, 140 Pa., 19. 8 Pa. County, 96. 9. When the gates at a railroad crossing are habitually kept closed, and only opened for the passage of vehicles, it is for the jury to say whether the closed gates are any warning at all to

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pedestrians. No reasonable person, however, finding the gates closed, would attempt to cross the tracks at such location without asking the gateman for information. Failing to take that precaution, he will be deemed guilty of contributory negligence. *Sheehan vs. R. R.*, 15 Pa. County, 209.

XX. NEGLECT TO REMOVE OBSTRUCTIONS. 1. A train of cars at the intersection of a railroad with a turnpike was cut in two, in order to leave space for the passage of vehicles. Plaintiff before crossing the railroad stopped his vehicle, but, being beckoned by a train hand to come on, did so, and while between the cars, a loud noise was made by the train, which frightened the horse and resulted in injury to the driver, who was thrown from the wagon. Held, the question of negligence was properly submitted to the jury, as the train had no right to occupy such portion of the crossing. *Penna. R. R. vs. Hirst*, 110 Pa., 226. 2. In case of a railroad accident, the company is entitled to reasonable time in which to remove an obstruction thereby occasioned at or near a public crossing. A traveler, knowing of such obstruction, is guilty of contributory negligence in attempting to drive a skittish horse past it. *Pittsburg Southern R. R. vs. Taylor*, 15 W. N., 37. 3. The act of April 4, 1868, applies to persons lawfully engaged on or about a railroad, in a business directly connected with the railroad, but it does not apply to one who in attempting to cross a railroad track with his team, attempted to move an empty car which blocked his path and was killed by an engine which suddenly struck the car. *Richter vs. Penna. Co.*, 104 Pa., 511. 4. For a party with full knowledge of the existence of a wreck of overturned cars to drive a spirited horse near them, when he could readily have chosen another road, is contributory negligence. *Pittsburg Southern R. R. vs. Taylor*, 104 Pa., 314. 5. One who passes along an obstructed highway is bound to observe ordinary care; that is, such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself and property from injury. *Penna. R. R. vs. McTighe*, 46 Pa., 316. 6. Where a life is lost at the public

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the crossing of a railroad, and the only evidence of the cause of accident is the finding of the foot of the deceased in an opening by the side of the track, it is enough evidence to go to the jury as to whether it was occasioned by the neglect of the defendant company to keep the planking between and near the tracks in good repair. *Brown vs. R. R.*, 15 Phila., 321. 7. Under the act of March 20, 1845, an engineer of a railroad company obstructing the crossing of a public street shall be subject to a penalty of \$25, to be recovered in the name of the commonwealth. *Cabe vs. Jacoby*, 23 **Pittsburg Journal**, 143. 8. A grant of right of way in a densely populated city does not confer on a railroad company the right to permit their locomotives and cars to remain on the tracks in such city for a longer time than is necessary to receive and discharge freight and passengers. *Mayor of Allegheny vs. R. R.*, 26 **Pa.**, 356.

XXI. NEGLIGENCE BY TRESPASSING ON THE TRACKS. 1. Railroad tracks, except at crossings, are for the exclusive use of cars and locomotives. Where one goes upon a track unnecessarily, and thus voluntarily assumes a position of peril, he is guilty of contributory negligence, and if he be injured by a car he cannot recover damages. *Dell vs. Glass Co.*, 36 **W. N.**, 467. 2. The use of a railroad track or embankment, except at lawful crossings of public roads, is exclusively for the company and its employees. Hence, where want of ordinary care is not shown, a railroad company is not liable for an injury to a person on the road, where he had no right to be. *Philadelphia & Reading R. R. vs. Hummell*, 44 **Pa.**, 375. 3. Where a person, without right, with a full knowledge of the location, voluntarily goes upon a railroad track, at a place where there is no crossing, and which is a known place of danger, and is killed by a passing train, it is negligence *per se*, and no damages can be recovered for his death, except for wanton injury. *Pittsburg R. R. vs. Collins*, 87 **Pa.**, 405. 4. Where a person walks upon the track of a railroad, he cannot recover from the company except for wanton injury, although the negligence of the company's agent contributed

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to the result. Except at crossings, where the public have a right of way, one who steps on a track does so at his peril. In England it is a penal offence for a man to be found unlawfully upon the track of a railroad. The employees of a company whose duty requires them to go on the track, if injured, have no redress against the company; they take the risk upon undertaking the employment. *Mulherin vs. Del. & Lackawanna R. R.*, 81 Pa., 366. 5. Railroad companies are not under obligations to take precautions against any class of persons who may walk on their track. The fact that the trespasser is a boy ten years old, cannot affect the application of the rule. *Moore vs. R. R.*, 99 Pa., 305. 6. Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company has not only a right of way, but such right is exclusive at all times and for all purposes. This is necessary for the protection of the company's rights and for the safety of the traveling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of a single foolhardy man, who desires to walk upon the track. *Railroad vs. Norton*, 24 Pa., 465. *Ham vs. Canal Co.*, 155 Pa., 568. 7. If a party walks on a railroad track he is a trespasser. He is guilty of negligence if he steps upon the track directly in front of an approaching locomotive. The presumption that he performed his duty to stop, look and listen, is overborne by the proof that he was struck by a locomotive the moment he set his foot upon the track. *Penna. R. R. vs. Mooney*, 126 Pa., 244. 8. A railroad company built a barbed wire fence so as to prevent persons from using a path across the track. In spite of the fence, many people continued to use the path, by getting under the fence. The court held that such parties were trespassers, and in attempting to use the path assumed every risk that might possibly occur. *Comly vs. R. R.*, 22 W. N., 42. 9. The unauthorized use of the track of a railroad by the driver of a horse attached to a truck car is such negligence as will prevent the recovery of damages for any

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injury, not intentional or wanton, resulting therefrom, to the person so using it. One cannot recover damages for an injury caused concurrently by his own negligence, and the negligent or unskillful acts of the defendant. *Heil vs. Glanding*, 42 Pa., 493. 10. Railroads are not liable for injuries inflicted by passing trains on persons walking on their tracks, even though such persons be of tender years. *Moore vs. R. R.*, 11 W. N., 310. *Boyd vs. R. R.*, 2 W. N., 198. 11. A person who is ejected from a train, is not at liberty to walk upon the track of a railroad for any considerable distance further than necessary to reach a place of safety. His disregard of such duty, even though it be due to his being somewhat intoxicated, will be negligence, which will bar an action for his injury by being struck by a train. *Ham vs. Canal Co.*, 142 Pa., 617. 12. Where a railroad leased side tracks to a canal basin, it had the right to detach cars and send them on without a brakeman. This would not be the case where, by license or sufferance, they permitted the public to enjoy the privilege of passage over such tracks. *Kay vs. Penna. R. R.*, 65 Pa., 269. 13. When a person deliberately places himself in a dangerous position by walking alongside of the tracks, and is struck by a railroad train, there can be no recovery of damages, even though he carefully stop, look and listen. *Penna. R. R. vs. Bell*, 5 Lancaster Review, 405. 14. While standing on the side track of a railroad conversing with friends, a freight train, alleged to have been negligently loosened on such siding, struck the deceased. Held, that the party was guilty of contributory negligence, and that his widow had no right of action for his death. Tracks, except at crossings, are for the exclusive use of trains and locomotives. *Dell vs. Glass Co.*, 169 Pa., 549. 15. The fact that plaintiff in waiting for a train, by direction of the conductor, stood in the middle of one of a number of tracks, and as a result was injured, is no excuse for neglecting ordinary precautions for his safety. *Foreman vs. R. R.*, 1 Pa., Dist., 233. 16. Where a pedestrian risks his life by standing for several minutes on a

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railroad track, or so near to it as to be in constant danger from passing trains, he is guilty of negligence. *Penna. R. R. vs. Fortney*, 90 Pa., 327. 17. It is negligence *per se* for a party to stand between two tracks on a railroad while a train is passing. The fact that no warning was given by an approaching engine on one of the tracks makes no difference; for the engineer of such locomotive would naturally suppose that the party who had voluntarily placed himself in a position of danger would step one side and avoid injury. *Moore vs. R. R.*, 108 Pa., 350. 18. Standing between two tracks of a railroad and not keeping watch for approaching trains constitutes contributory negligence. *Snell vs. R. R.*, 1 C. P. Reporter, 24. 19. A passenger at a railroad station, who, anticipating the approach of his train, stands on the planking between tracks, and is injured in consequence of a coal train backing on one track while his train is approaching on the other, is guilty of contributory negligence; there being a safe place beyond the tracks provided by the company where he could have remained until the actual arrival of his train. *McGeehan vs. R. R.*, 149 Pa., 188. *Shutt vs. R. R.*, *Idem*, 266. 20. Where an injury is the result of mutual and concurring negligence in the parties, no action for damages will lie. Where a person places himself on the track of a railroad, he can claim no damages except for wanton injury, even though the negligence of the company's agent contributed to the result. In the present case, the plaintiff had a portable engine and circular saw, which he placed on the connecting link between two railroads. *R. R. vs. Norton*, 24 Pa., 465.

XVII. NEGLECT TO ABATE SPEED OF TRAIN. 1. Railroad trains may be run at a high rate of speed to reach their greatest utility; but in populous towns and cities the speed must be moderated, and the engineer must keep a watchful look-out in traversing a populous street. It is not necessarily negligence *per se* of parents, that a child of tender years escapes from their vigilance, and in crossing a railroad track is crushed by a train running at dangerous speed. *Phila. & Reading*

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R. R. vs. Long, 75 Pa., 257. 2. It is not common prudence or ordinary care for trains to enter the outskirts of a city at a dangerous rate of speed. Although persons on a railroad track are trespassers, regard must be had to the habits, character, condition and circumstances of a people living in a city and on the line of a railroad. The speed of trains through towns and cities may be regulated by ordinance. *Penna. R. R. vs. Lewis*, 79 Pa., 33. 81x Pa., 194. 3. A city has the power to pass an ordinance to regulate the speed of trains within the city limits. A railroad company has no greater rights within cities than other corporations. *Penna. R. R. vs. James*, 22 *Pittsburg Journal*, 54. 4. If a train moves at an undue rate of speed through the streets of a city, or if the engineer fails to sound the whistle before crossing a highway, there is obviously a neglect of duty, for which the company should be held responsible. But when the case requires judgment or discretion, and there is no proof of the want of proper skill, it will not do to infer negligence, merely because the result shows that some other course might have been better than the one taken. *Watson vs. R. R.*, 7 Phila., 250. *McGettigan vs. R. R.*, 5 W. N., 235. 5. A rate of speed over twenty-five miles an hour in a populous neighborhood of a city is too great, and rebuts any presumption of negligence on the part of a person killed by a train, while attempting to cross the street. *Hagan vs. R. R.*, 5 Phila., 179. 6. What is a reasonable rate of speed of an engine crossing a highway is a question for the jury. No rule prescribes the rate of speed on a railroad compatible with the safety of the public. It is agreed, however, that when a train approaches a public crossing at a populous place, it is a necessary precaution to moderate the speed, so that by the use of the brakes and reversing the engine, the train may be readily stopped. The fact that a pedestrian, in crossing railroad tracks, was frightened by the rapid approach of a train, became bewildered and went the wrong way, is not proof of negligence on his part. *Delaware & Lackawanna R. R. vs. Smith*, 1 *Walker*, 88. 19 *Pitts-*

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burg Journal, 13. *Penna. R. R. vs. Brooks*, 2 **Walker**, 122. 7. It is not negligence for a railroad company to run its trains over a public crossing in the open country at the rate of thirty miles an hour. It is only the force of special circumstances that requires a less rate of speed. *Reading & Columbia R. R. vs. Ritchie*, 102 **Pa.**, 425. 8. Railroad companies may move their trains in the country at such rate of speed as the character of their machinery and road-bed may make practicable, and the maximum rate of speed in such cases is not a question for the jury. Nor is a high rate of speed negligence *per se*. But the greater the speed, the greater the degree of care required in giving warning when approaching a road or crossing at grade. *Childs vs. R. R.*, 150 **Pa.**, 73. 9. Where a railroad train has given a proper warning signal as it approaches a grade crossing in the open country, it is not required to slow up or stop until a traveler, who has had opportunity to see and hear the train, has passed the crossing. *Newhard vs. R. R.*, 153 **Pa.**, 418. 10. It is negligence in a railroad company to run a special train at a high rate of speed, and without any warning when approaching an admittedly dangerous railroad crossing. *McWilliams vs. Keim*, 22 **W. N.**, 372. 11. Where there is evidence that a railroad crossing was dangerous, and was approached by a train at a very high rate of speed, the railroad company did not perform its whole duty in sounding the whistle and ringing the bell of the engine at a proper distance therefrom. If it was a dangerous crossing, it was the duty of the plaintiff to exercise the more care in approaching it, but it was equally the duty of the defendant company to see that their trains passed it at a reasonable rate of speed proportioned to the danger. While a high rate of speed is allowable in rural districts, it might be attended with danger to life in more thickly populated sections and at dangerous crossings. *Ellis vs. R. R.*, 138 **Pa.**, 519. 12. Where the driver of a team, on approaching the crossing of a railroad in a borough, stopped, looked and listened for a

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train, and not observing any, called upon his young son who was riding the lead horse, to come on, while he himself took the second horse by the head, he was guilty of no negligence. Where a subsequent accident to the boy and the lead horse from a train which was running through the borough at the rate of twenty miles an hour, ringing no bell and blowing no whistle till after the accident, the company was clearly liable for negligence. *Penna. R. R. vs. Bock*, 93 Pa., 427.

XXIII. NEGLECT TO PROTECT PASSENGERS. 1. The carrier is bound to guard the passenger from every danger which extreme vigilance can prevent. The slightest neglect resulting in hurt or loss, against which human foresight and prudence may guard, renders the carriers of passengers liable. Railroads must keep pace with science, art and modern improvements in their application to the carriage of passengers. The requirement of extreme care does not extend beyond the use of known machinery and the modes of using it. *Meier vs. Penna. R. R.*, 64 Pa., 225. 2. Carriers of passengers are liable only for negligence, and are not insurers of the safety of their passengers as they are as carriers of goods and baggage of passengers. The carrier is bound to guard the passenger from every danger which extreme vigilance can prevent. *Meier vs. Penna. R. R.*, 64 Pa., 225. 3. The management of a railroad demands the strictest vigilance. The company is responsible for every injury caused by defects of the road, the cars or the engines, or by any species of negligence, however slight, of which they or their agents may be guilty. But they are not insurers against the perils to which a passenger may expose himself by his own rashness or folly. There can be no recovery for an injury caused by mutual default. *R. R. Co. vs. Aspell*, 23 Pa., 149. 4. A carrier of passengers is bound to omit no precaution that may conduce to their safety. The dangers incident to travel in railway cars are less than those incident to other modes of travel, but among the most prominent of them is risk to limbs thrust out the windows. The most careful passengers unconsciously suffer their elbows to project

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beyond the window sill. The carrier can prevent this by setting a few perpendicular metallic rods in the window or a netting of wire work, or even wooden slats. These precautions need, however, only be used on a railroad which in some places is so narrow as to endanger projecting arms. *R. R. Co. vs. Kennard*, 21 Pa., 203. 5. If a passenger in a railroad car were known to be subject to epileptic fits or insane, more care and attention would be required of the carrier than in ordinary cases; but the carrier must know the condition of the passenger, and that extra care was necessary and his duty. *Pittsburg R. R. vs. McCling*, 56 Pa., 294. 6. Carriers of passengers on railroads are not insurers of the lives and limbs of their passengers; but the implied contract binds them to exercise the highest degree of care and prudence, and makes them liable for the slightest neglect. In the present case, a collision resulted from a mail train running into the rear of an accommodation train, which, from the spreading of rails, was unable to proceed. It was left to the jury to decide, whether it was the duty of the conductor of the slow train to switch it off, until the expected mail train should pass. *Peters vs. Rylands*, 20 Pa., 501. 7. A railroad company, carrying passengers, cannot shield itself from the consequences of its negligence, by showing that a person injured obeyed specific instructions of the conductor, instead of general directions, of which he was aware. In this case, by the rules of the company, a party in charge of live stock should remain on the cars which contained his stock, but the conductor transferred him to the emigrant car. *R. R. vs. McCloskey*, 23 Pa., 526. *Creed vs. R. R.*, 86 Pa., 139. 8. A railroad company is bound to use the highest degree of care and diligence for the safety of its passengers. Where an accident occurs as to the result of a misplaced switch, the burden of proof is on the company to show that by no human skill or forethought could the accident have been prevented. The jury have no right to find that the misplacing of a switch was the work of a stranger without evidence to that effect. *New York & Lake Erie R. R.*

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vs. *Daugherty*, 11 W. N., 437. 9. Those entrusted with the management of a railroad are bound to exercise the utmost care, skill and diligence in relation to their passengers and the property committed to their charge. But they are only responsible for the direct and immediate consequences of errors committed by themselves. *Conroy vs. R. R.*, 1 Pittsburg, 440. 10. A carrier of passengers must exercise the utmost degree of care and diligence to secure the safety of its passengers. It must provide a safe road-bed, well-constructed cars, engines, and skillful, trustworthy servants to take the management of the trains. All these things are under the exclusive control of the officers of the company, and the public have no right to interfere in regard to them. When, therefore, a passenger is injured by a collision or other accident while on his journey, the law presumes the accident to be due to want of proper care on the part of the transporting company, and puts the burden of showing the actual condition of the track, etc., on the carrier, who is placed at once upon the defence. But the reason ceasing, the rule ceases. If an intoxicated passenger stumble upon a heated stove in the car or station and is injured, he is not entitled to damages because he bought a ticket. *Hayman vs. R. R.*, 20 W. N., 466. 11. In transferring passengers from one train to another, reasonable time should be given them to make the change and attend to their baggage. In the present case, a passenger encumbered with bundles attempted to move from one train to another, missed his footing owing to the sudden starting of the cars, fell and was injured. *Johnson vs. R. R.*, 20 Pittsburg Journal, 31. 12. It is not the duty of a railroad company to place screens at the windows of its cars, either to prevent passengers from putting their heads or arms out, or to protect them against missiles hurled by outsiders. *Missimer vs. R. R.*, 17 Phila., 172. 13. Where a passenger, in spite of printed and personal warnings in the cars, extends his arm outside the window, whereby it is broken in passing a bridge, held, a railroad company is not liable for the acci-

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dent. The slightest neglect, against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render the company liable in damages. *Laing vs. Colder*, 8 Pa., 481. 14. When a traveler puts his arm or elbow out of a car window voluntarily, without any qualifying circumstances impelling him to it, it must be regarded as negligence *per se*: and when that is the evidence, it is the duty of the court to declare the act negligence in law. A passenger has the right to enjoy a window, but not to occupy it. Its use is for the benefit of all, and not for the comfort alone of him who has by accident got nearest to it. *Pittsburg R. R. vs. McClurg*, 56 Pa., 294. 15. Failing to furnish a passenger with a seat, he may sit in any unoccupied seat, even though it be in a sleeping car. *Le Van vs. Penna. R. R.*, 3 W. N., 496. 16. As a general rule, it is the duty of a railroad company to provide suitable car accommodations and seats for those it undertakes to carry; and if a passenger, exercising reasonable care and prudence, is injured in consequence of the company's neglect of duty in that regard the company is liable to respond in damages for the injuries thus occasioned solely by its own negligence. Even if under such circumstances, a passenger might not be guilty of contributory negligence in passing from car to car in quest of a seat while the train was in rapid motion, it certainly would be gross negligence in him to voluntarily take a position near the outer edge of the platform, and to remain there until, by an ordinary jolt of the car, he lost his balance and was thrown off. *Camden & Atlantic R. R. vs. Housey*, 99 Pa., 492. 17. A railroad company is liable in damages for the carelessness of a brakeman in prematurely turning a switch during the passage of a train, whereby the last car was thrown from the track and turned over, resulting in injury to a passenger. *Penna. R. R. vs. Fuller*, 3 Pennypacker, 170. 18. A carrier of passengers is not liable for the wrongful acts of strangers, unless the carrier was remiss in not discovering them in time to avert the injury. *Fredericks vs. R. R.*, 157 Pa., 103, 121.

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19. A railroad company is not bound to protect its passengers from rudeness on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace. The company is not liable for an injury to a passenger caused by another passenger rudely and abruptly pushing a swinging door against such passenger's face. *Graeff vs. R. R.*, 161 Pa., 230. 20. There is no such privity between a railroad company and a passenger as to make it liable for that passenger's injury to another, upon the principle of *respondeat superior*. It is the duty of railroad companies to provide men enough for the ordinary demands of transportation, but not to provide a police force. Passengers take the risk of injury from mobs by the way. *Pittsburg & Fort Wayne R. R. vs. Hinds*, 53 Pa., 512. 21. Where a person becomes a passenger upon a railroad train, his consent is implied to the company's reasonable rules for entering, occupying and leaving the cars, and if injury befalls him by reason of his disregard of regulations necessary to the conduct of the business, the company is not liable in damages. *Deery vs. R. R.*, 163 Pa., 403. 22. In an action against a railroad company to recover damages for personal injuries, it appeared that the injuries were inflicted upon the track and by the engine and cars of another company. Though no proof was adduced that the road of such company was owned or leased by the defendant, yet it was shown that the defendant company was operating it at the time of the injury, hence it was proper to submit to a jury the question of the defendant's responsibility. *Penna. R. R. vs. Sellers*, 127 Pa., 406. 23. In an action against a railroad company to recover damages for the death of a person caused by a collision between a train of the defendants and a street passenger car on which the deceased was traveling, the plaintiff, in order to recover, must show that the death resulted directly from the negligence of the defendant's servants, and also that the servants of the carrier company were guilty of no negligence. In such case, the measure of duty of the carrier company is extraordinary care; that of the non-carrying company is merely ordinary

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care. *Phila. & Reading R. R. vs. Boyer*, 97 Pa., 91. 24. If a passenger be injured by a negligent collision of the trains of two railroad companies, he may maintain one action against both. *Klauder vs. McGrath*, 35 Pa., 128. 25. Where a passenger on a railroad is injured by a collision resulting from the mutual negligence of those in charge of the road and of another party who had been allowed to pile barrels alongside the track, the carrier must answer for the injury. But if the negligence of the carrier did not directly contribute to the accident, though there may have been negligence in a general sense, the other party will be answerable, if the act of his servants or agents was the proximate cause of the disaster. *Lockhart vs. Lichtenthaler*, 46 Pa., 151. *Lackawanna R. R. vs. Chenewith*, 52 Pa., 387. 26. The owners of passenger cars employed on a railroad belonging to the state, are liable as common carriers for an injury sustained by a passenger from a collision of two of their trains passing in the same direction, though the motive power of the road was furnished by the state, and was under the control of the state's agents, through whose negligence the accident happened. *Ryland vs. Peters*, 5 Clark, 126. 27. Where an injury to a passenger upon a railroad was caused by the negligence of the employees of a private railroad crossing the former at grade, without negligence of the passenger carrier also, the latter is not liable. *Bunting vs. R. R. Co.*, 118 Pa., 204. 28. If an injury to a passenger on a railroad has no connection with the appliances or machinery, and does not involve the safety or sufficiency of the instrumentalities of transportation, or the negligence of the carrier's servant, no presumption of negligence arises against the company, and the burden of proof to show negligence is upon the plaintiff. In this case, a rock became detached and fell upon a passenger car, causing the death of a passenger. The company was absolved from liability. *Fleming vs. R. R.*, 158 Pa., 130. 29. A passenger seated in a moving train at an open window was struck violently in the eye by a piece of coal which apparently came

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from another train which was rapidly passing in the opposite direction. Evidence was shown that both trains had approved spark-arresters on their engines, and that there was no derailment, or collision with any object on the road and no breaking of machinery. It is incorrect to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done a passenger. The presumption arises from the cause of the injury or from other circumstances attending it, and not from the injury itself. *Penna. R. R. vs. McKinney*, 124 Pa., 462. 30. Where a passenger on a railroad train, while sitting at the window of a car, was injured by a missile, and there was nothing to connect the accident with a defect in the appliances of transportation, or any negligence on the part of the company or its employees, there can be no recovery against the company. *Thomas vs. R. R.*, 148 Pa., 180. 31. Where the plaintiff's testimony in an action for negligence, shows that the injury resulted from some cause not connected with the instrument of transportation, its management or equipment, or where the cause is unascertainable, negligence cannot be inferred from the fact of injury, but must be proved. *Spear vs. R. R.*, 3 Pa. County, 472. 32. Where an injury is chargeable to the manner of coupling a car, a presumption of negligence on the part of the company does not arise, if the accident is to the passenger, and not to the car. In the present case, plaintiff was injured by a severe shock caused by defendant's employees permitting a car which they were coupling to strike the train in which the plaintiff was located, with unnecessary force. The defendant maintained that the coupling was made in a lawful manner. The burden of establishing negligence was on the plaintiff. *Hersine vs. R. R.*, 151 Pa., 245. 33. If a passenger seated in a railroad car is injured by a collision, or by a defect in any part of the machinery, a *prima facie* case of negligence is established, and the *onus* of disproving it is cast upon the company. *Delaware & Lackawanna R. R. vs. Napheys*, 90 Pa., 135. 34. Where a passenger is injured by an accident arising from

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a collision or a defect in the machinery or roadway, he is required, in the first place, to prove no more than the fact of the accident, and the extent of the injury ; a *prima facie* case is thus made out, and the *onus* is cast upon the carrier to disprove negligence. This presumption may be overthrown by proof that the injury complained of resulted from inevitable accident, or from something against which human prudence or foresight could have provided. *Phila. & Reading R. R. vs. Anderson*, 94 Pa., 351. 1 **Chester Co.**, 5. 35. When a railway passenger, without fault of his own, is injured, the presumption of negligence is against the company, and this can only be rebutted by showing that the injury arose from an accident which could not have been prevented by care and diligence. *Dayton vs. R. R.*, 1 C. P. Reporter, 9. 36. *Prima facie*, where a passenger on a train is injured without his own fault, there is negligence in the carrier, casting the burden of disproof on the carrier, from which he may relieve himself by showing that the injury arose from an accident, which the utmost skill, foresight and diligence could not prevent. Where constant care has been exercised to keep the running gear in good order, and the best-known machinery has been used, the company is not responsible for injury resulting from the breaking of the axle of a truck on the train. *Meier vs. Penna. R. R.*, 64 Pa., 225.

XXIV. NEGLECT BY JUMPING FROM MOVING TRAIN. 1. It is negligence *per se* for a passenger to jump from a railroad train at a station while the train is in motion, and he cannot recover damages for an injury occasioned thereby. Where such act was voluntary on his part, and not suggested or requested by an employee of the company, and there existed no necessity for assuming such risk, the passenger is to blame. *McClintock vs. R. R.*, 21 W. N., 133. 2. It is negligence on the part of a passenger to attempt to get off a train of cars while it is in motion, and in a suit against the railroad company for damages for an injury thereby received, a binding instruction to the jury to find for the defendant is

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proper. *Victor vs. R. R.*, 164 Pa., 195. 3. Where a passenger attempts to alight from a train while it is still in motion, he is guilty of contributory negligence, which justifies binding instructions for the defendant. *Brown vs. Barnes*, 151 Pa., 562. 4. If a passenger attempts to leave a train after it has started, in disregard of the warning of conductor or brakeman, he is guilty of contributory negligence, and cannot recover for injury resulting from such temerity. *New York & Lake Erie R. R. vs. Enches*, 127 Pa., 316. 5. If a passenger is negligently carried past his station, he can recover compensation for the inconvenience, the loss of time and the labor of traveling back. But, if he be foolhardy enough to jump from the train, without waiting for it to stop, he does it at his own risk. A person, however, is not chargeable with neglect of his own safety when he exposes himself to one danger by trying to avoid another, as by leaping from a train, on a well-grounded fear of an approaching fatal collision. *R. R. Co. vs. Aspell*, 23 Pa., 150. 6. Where, in an action to recover for injuries received by a passenger while alighting from a train, the testimony is conflicting as to whether the train was in motion at the time, the question of plaintiff's contributory negligence is for the jury. *Enches vs. R. R.*, 135 Pa., 194. 7. A passenger who, without necessity, attempts to alight from a moving train, though warned by a fellow-passenger not to do so, is guilty of contributory negligence, and cannot recover for an injury received in such attempt. While not bound to obey a warning, the person warned disregards it at his peril, from whatever source it comes. His attention being drawn to his danger, his duty is to avoid it, and not to do so is negligence. *Kilpatrick vs. R. R.*, 140 Pa., 502. 8. A news company, without the plaintiff's consent, employed his son, a bright lad of fifteen, to sell goods on passenger trains, with instructions not to get on a train until it stopped, to get off before it started, or failing to do so, to remain on the train until it halted at the next station. In an action against the news company for alleged negligence, resulting in

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the death of the son, it was shown that the above instructions were disregarded by the lad, who jumped from the train while it was in motion, losing his life thereby. It was not error to order a nonsuit. *McMellen vs. Union News Co.*, 144 Pa., 332. 9. In an action for negligence brought against a railroad company by a passenger who, while encumbered with packages, made an effort to alight from a train and fell upon the ground, receiving injuries thereby, the court properly submitted to the jury the question, whether the car was in motion when the plaintiff stepped from it, with instructions that if that was the fact, she could not recover damages, unless she had reason to apprehend greater danger from remaining on the train, or the suddenness of the danger confronting her rendered her incapable of exercising proper judgment. *Leggett vs. R. R.*, 143 Pa., 39. 10. It is the duty of a railroad company not only to carry its passengers safely, but also to afford them an opportunity of ingress and egress. It is negligence for a passenger to leave his seat while a car is slowing up near a station or elsewhere, if, by remaining in his seat until the car stops, the accident complained of would not have occurred. *Dunn vs. R. R.*, 20 Phila., 258. 11. It is contributory negligence on the part of a passenger to attempt to alight from a train before it has entirely stopped, even if the train, in slowing up, passes the station before it actually is brought to a halt. *Blue vs. R. R.*, 1 *Monaghan*, 757. 12. A passenger on a railroad train was awakened by the car leaving the track and running over the sleepers. He left his seat, and following an employee of the company, jumped from the platform and was injured. The court stated to the jury; that if the plaintiff jumped from apprehension of danger which did not exist, he could not recover, but if he did what a prudent man naturally would have done, he was entitled to damages. *Pittsburg & Buffalo R. R. vs. Rohrman*, 13 W. N., 258. 13. A passenger who gets off a railroad at a station while the train is still moving, and is injured, is guilty of negligence. *McClintock vs. R. R.*, 32 *Pittsburg Journal*, 452. 14. A person who is in

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danger of being carried past his destination, and jumps from a moving train to prevent it, cannot recover damages for an injury received. *Penna. R. R. vs. Aspell*, 2 *Pittsburg Journal*, 26.

15. The rule that it is negligence in a passenger to jump from a moving train is subject to exceptions, as where the passenger is placed in peril by the default or negligence of the company's employees, or leaves the train when in motion, by their direction. The question how long a train should stop at a station to permit passengers to enter, and leave the cars, is for the jury. Declarations of the plaintiff as to the causes of his injuries, made immediately after the accident, while the plaintiff still lay upon the railroad platform where he fell, are admissible as part of the *res gestæ*. *Penna. R. R. vs. Lyons*, 129 *Pa.*, 113.

16. Where the progress of a train was checked by huge banks of snow on both sides of the track, and at the suggestion of a brakeman an elderly female passenger attempted to alight by walking on freight cars loaded with lumber, whereby she fell and was injured, held, that the jury was justified in awarding her damages, the question of defendant's negligence and of plaintiff's alleged contributory negligence being solely for their decision. *Hartzig vs. R. R.*, 154 *Pa.*, 364.

17. When a railroad company has provided safe and convenient means of ingress and egress to and from its trains, upon one side of its track, it has in this particular discharged its whole duty to its passengers, and it is not bound to anticipate, in disregard of its reasonable and known regulations, they will alight upon the opposite side. Wherefore, a passenger voluntarily alighting upon the wrong side of the train and falling into an excavation made by the railroad company, cannot recover damages for his injuries. He was bound to alight from the car upon the platform erected for that purpose. That was a reasonable regulation of the company. *Drake vs. R. R.*, 137 *Pa.*, 352.

18. A railroad company which has provided a sufficient platform for the egress of passengers from its cars, is not liable for injuries to a passenger sustained by his voluntarily alighting on the opposite side, and stepping on the other track, instead of

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on the platform. The company would only be liable in such case, where it was guilty of gross negligence in acquiescing in such mode of egress. It was not negligence on the part of the company, that it did not by force or barriers prevent the parties from leaving on the wrong side. People are not to be treated like cattle, but are presumed to act reasonably. *Penna. R. R. vs. Zebe*, 33 Pa., 318. 19. A railroad company, undertaking to carry passengers to an intermediate point on their road, should stop there a sufficient length of time to enable passengers to alight; and if a passenger be injured as the result of a premature starting of the train, the company is liable in damages. *Penna. R. R. vs. Kilgore*, 32 Pa., 292. 20. Where a railroad company provides a platform or other safe mode of exit from its cars, at a station, it is the duty of passengers to leave by the way provided, unless it be unsafe, or a necessity exists to escape from danger to life and limb; and it is error to admit evidence that persons were in the habit of getting out of the cars on the side opposite the platform. *Penna. R. R. vs. Zebe*, 37 Pa., 420. 21. Where an accident to a passenger occurs without any connection with the appliances or means of transportation, or the misconduct of employees, no presumption of negligence arises against a railroad company. In the present case, a passenger when alighting from a train stepped upon a small fragment of wood lying upon the station platform, and sprained her ankle. *Bernhardt vs. R. R.*, 159 Pa., 360. 22. Where a train has come to a stop, and a passenger, on stepping from the lowest step of the platform of the cars to the ground, fractures her knee-cap without any apparent external cause, no presumption of negligence is raised. While it is the duty of a railroad company to provide safe and convenient means of ingress and egress to and from the cars, it is equally the duty of passengers to use the means thus provided with reasonable care. *Delaware & Lackawanna R. R. vs. Napheys*, 90 Pa., 135. 23. Ordinarily it is negligence to get on or off a moving train, and one who does so and is injured cannot recover from the railroad corpo-

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ration, no matter what may have been the negligence of the company. But where a train stopped at a regular station, and a passenger hastened through the car to the platform with intent to alight, found the platform obstructed with passengers entering the car, reached the lower step just as the cars began to move from the station, fell and was injured, it is for the jury to say what a prudent man would have done under similar circumstances in the same situation, and whether the company was not guilty of negligence in not stopping the train a reasonable time for the ingress and egress of passengers. *Penna. R. R. vs. Peters*, 116 Pa., 206. 24. A woman is not entitled to recover damages from a railroad company for personal injuries received by being rudely jostled by another passenger as she was alighting from the train. The company is not bound to protect its passengers from rudeness on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace. *Ellinger vs. R. R.*, 153 Pa., 213. 25. Where, in an action against a railroad company to recover damages for personal injuries, resulting from a brakeman interfering with a passenger who was alighting from a train, the plaintiff's testimony, though uncorroborated and flatly contradicted, should, if it sufficiently showed negligence, be submitted to the jury. *Phila. & Wilmington R. R. vs. Alvord*, 128 Pa., 42. 26. On a dark, rainy night a passenger for Jenkintown heard the conductor of a train announce that the next stop would be Jenkintown. In fact, the train was signalled and stopped short of the station. No notice was given the passengers, that the train had not reached Jenkintown. The plaintiff got off hurriedly, and on stepping from the platform fell into a creek and was injured. The question of negligence in this case was properly submitted to a jury. *Phila. & Reading R. R. vs. Edelstein*, 23 W. N., 342. 27. The conductor of a passenger train, on a dark night, announced the approach towards a station where passengers were to change cars, and afterwards stopped the train upon a bridge, without giving notice that the station was not reached. As a result, a passen-

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ger descended from the steps of the car, fell from the bridge and was drowned. Held, that the passenger naturally supposed the train had reached the station, and that proper attention to the safety of passengers required some notice or warning to them to retain their seats. *Phila. & Wilmington R. R. vs. McCormick*, 124 Pa., 427. 28. A passenger under the influence of liquor got out of a railroad car on a bridge opposite the end of a station platform, when the train had stopped at the station. The bridge had no railing, and the passenger fell into a creek below and was mortally injured. His widow was properly nonsuited. *Deselins vs. R. R.*, 149 Pa., 432. 29. It is customary for male passengers to alight when a train stops for any length of time. In the present instance, the train was stopped at night on a railway bridge by the opening of the draw. Several passengers, apprehending no danger, stepped off the train upon the bridge. Repairs were in progress that day upon the bridge, and the workmen had left a hole uncovered, through which a passenger fell. In a suit against an accident insurance company on a policy, it was held, that the man's death was caused by an accident, and hence the company was liable on the policy. *Burkhard vs. Ins. Co.*, 102 Pa., 262. 30. Where a passenger in alighting from a train was injured by stepping into the space between the steps and the platform, a nonsuit was properly entered in favor of the railroad company defendant, where the only witness examined could give no correct estimate of the distance. *Rothschild vs. R. R.*, 163 Pa., 49.

XXV. NEGLECT IN BOARDING A MOVING TRAIN. 1. For a person to attempt to get upon a railroad train, while it is in motion, is negligence *per se*. The fact that a defect existed on the station platform, and that in the attempt to board the moving train the person stumbled into a hole on the platform, and falling forward was killed under the cars, does not do away with the fact that there was concurring negligence barring the right to recover damages. *Bacon vs. R. R.*, 143 Pa., 14. 2. A lady passenger in attempting to enter a train was

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jostled off the step of the platform by the rude effort of a brakeman to pass her. She fell between the platform and car and was injured. The question of negligence on the brakeman's part was properly submitted to the jury. *Phila. & Wilmington R. R. vs. Alvord*, 24 W. N., 430. 3. It is for the jury to say, whether the danger of boarding the train when in motion was so apparent as to make it the duty of the passenger to desist from the attempt. Where the cars of two railroad companies are on different sides of the same platform, it was the duty of each company to give a reasonable time for the transfer of passengers and baggage from one train to the other, where the passenger has a through ticket binding on both roads. Even though the second train was distinctly in motion, so that an unconcerned bystander could notice it moving, yet the passenger, seeing himself about to be left improperly by the wayside, would naturally hurry to reach the train and to get aboard. *Johnson vs. West Chester R. R.*, 70 Pa., 364.

XXVI. NEGLIGENCE BY RIDING IN A DANGEROUS PLACE.

1. Where, by the rules of the company, the engineer and fireman are prohibited from taking any one on the engine, and they permit a man to ride thereon, it is out of the usual course of the company's employment, and if the person so invited is injured through carelessness, the company is not responsible. *Duff vs. R. R.*, 91 Pa., 460. 2. A passenger who voluntarily leaves his seat in the passenger car, in violation of the rules of the company, to ride in the baggage car, or other known place of danger, and is injured thereby, cannot recover damages therefor. Probably this rule would not apply to a brief visit to the baggage car to look after baggage or for other legitimate purpose. This law applies, notwithstanding the fact of the negligence of the company's servant was the cause of the accident. If a passenger wilfully violates a known rule intended for his safety, and is injured in consequence of such violation, he is not entitled to recover damages for such injury. *Penna. R. R. vs. Langdon*, 92 Pa., 21. 3. Where a passenger

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in the rough garb of a laborer saw fit repeatedly to ride in a baggage car, it will be presumed he rode there with the permission of the conductor. His right to recover for an injury resulting from a broken rail was the same when in a baggage car as when in a passenger car. *O'Donnell vs. Allegheny Valley R. R.*, 59 Pa., 246. 4. No legal presumption of negligence on the part of a passenger arises from the fact of his being in a car not intended for the use of passengers, when an accident happens. Where the conductor of a train permits a passenger to ride in a caboose attached to the train, and an accident occurs through the negligence of the company, whereby the passenger is injured, he may recover damages. *Creed vs. Penna. R. R.*, 86 Pa., 139. 5. Where one negligently and without excuse places himself in a position of known danger, and is thereby injured either wholly or partially by means of his own act, he cannot recover damages. An employee of a railroad company, while riding from his work on a train composed of an engine, tender and gondola car, sat on the narrow platform in the rear end of the tender with his legs and feet hanging over the edge. He had been warned of the danger of this position. In a collision of cars, he was killed. As he was guilty of contributory negligence, his widow failed to obtain a verdict for damages in an action instituted by her. *Lehigh Valley R. R. vs. Greiner*, 113 Pa., 600. 6. It was negligence on the part of a trackman employed on a railroad to ride on the platform of a truck car with his feet hanging over the side. In this position he was cast to the ground and injured. *McGrath vs. Coal Co.*, 4 Lancaster Review, 281. 7. Damages were awarded a passenger who on the invitation of the conductor of a train got upon the crowded platform of a car from which he was pushed off, owing to the efforts of the conductor to eject a passenger who had gotten upon the wrong train. *Dennis vs. R. R.*, 165 Pa., 624. 8. No matter how crowded may be the condition of a railroad car, it is gross negligence on the part of a passenger to voluntarily locate near the outer edge of the platform, from which he may be thrown

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off by an ordinary jolt of the car. *Camden & Atlantic R. R. vs. Housey*, 99 Pa., 492. 9. A passenger who occupies a dangerous place in sight of the conductor and is not warned to leave, will not be held guilty of contributory negligence. *Hanover Junction R. R. vs. Anthony*, 3 Walker, 210. 10. In an action for negligence against a railroad company, it is error to reject any evidence tending to prove that the plaintiff, although in the service of the company, was, by original contract, a daily passenger on the road, riding to and from the bridges and trestle work of the road, which he was engaged in erecting. The fact that, with the conductor's consent, he rode in the baggage car in pursuance of the custom of the road, would not indicate that he was out of place. *O'Donnell vs. Allegheny R. R.*, 50 Pa., 493.

XXVII. NEGLECT TO PROTECT TRESPASSERS. 1. A trespasser upon a railway train cannot be ejected therefrom without a reasonable regard for his safety. *Arnold vs. R. R.*, 115 Pa., 135. 2. A railroad company owes no duty to a trespasser riding on a train. The conductor of a train permitted a boy to ride daily to sell newspapers. This was against the rules of the company. The boy was killed on the train by an accident, caused by the alleged negligence of the company. In an action by the boy's mother for damages, held, that the boy was a mere trespasser to whom the company owed no duty, and the plaintiff could not recover. *Duff vs. R. R.*, 9 W. N., 504. 91 Pa., 458. 3. When a person, not a passenger, and without the knowledge of the railroad company's employees, is in a mail car, which is not intended for passengers, and with no right to remain there, the company is not liable for injuries received by him in a collision. *Bricker vs. R. R.*, 132 Pa., 1.

XXVIII. NEGLECT BY EJECTING PASSENGER. 1. A passenger's right to recover damages for injuries received, through the negligence of the conductor of a railroad train in putting him off the train at a dangerous and improper place, does not depend upon his right, under his contract with the company, to ride upon that train, but upon the fact that his injuries were

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the natural consequence of the negligent act of the conductor. A passenger who enters a car without knowledge that his ticket is not good on that train, is not a trespasser. If the conveyance is one which he had no right to take, the conductor should so inform him and put him off at a proper place. *Lake Shore R. R. vs. Rosenzweig*, 113 Pa., 519. 2. A railroad company cannot be sued in an action of trespass *vi et armis* for the act of a conductor in ejecting a passenger for not proffering what the conductor deemed a proper ticket. In such an action, it must appear that the particular act of the employee was done by the command or assent of the officers of the company. *Allegheny Valley R. R. vs. McLain*, 91 Pa., 443. 3. Where a passenger is wrongfully ejected by a conductor from a train, he is not bound to use his best judgment, but only good faith and reasonable prudence. He is not deemed guilty of contributory negligence in leaving the station and not awaiting the arrival of a subsequent train, but seeking his way home through a heavy storm. *Malone vs. R. R.*, 152 Pa., 390. 4. It is the duty of a passenger who is wrongfully ejected from a train and placed upon the track, to leave the track at the earliest possible opportunity, and the burden of proof that he did so is upon him. Except at crossings, where the public have the right of way, a man who steps his foot upon a railroad track does so at his peril. *Ham vs. Canal Co.*, 155 Pa., 548, 568. *Railroad vs. Norton*, 24 Pa., 465. 5. A passenger purchased a through ticket, but stopped off at an intermediate point. The ticket under the rules of the company was cancelled for the whole route. Subsequently he entered another train and offered the ticket for his passage to the original destination. The conductor took up the ticket, refused to allow him to ride, and ejected him from the train in a place remote from shelter, and in a storm. The passenger offered to pay his fare, if the ticket was returned him. Held, that by denying plaintiff's right to ride on the ticket, the conductor waived all right to retain it. Evidence that the conductor allowed the passenger to ride past several stations after demanding the

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fare, and ejected him at a place remote from shelter should have been received in the action. *Vankirk vs. Penna. R. R.*, 76 Pa., 66.

6. A railroad company is liable for injuries resulting from the negligence, violence or carelessness of its conductors in removing from the cars a passenger who refused to pay his fare or produce his ticket, in consequence of which he died. If, by an act done by a servant within the scope of his ordinary employment, another person is injured, that person may maintain an action against the master. A railway company is bound to employ as conductors on its cars none but capable, prudent and humane men. *Penna. R. R. vs. Vandiver*, 42 Pa., 365. 7. Where the conductor of a railroad train, acting in the line of his duty, ejects from the platform of a car a person who has no right thereon, the company is liable if he has done it in a careless or reckless manner; but for his unauthorized wilful and wanton or malicious trespass, the company is not liable. *Penna. Co. vs. Toomey*, 91 Pa., 256. 8. Although one who enters a train may have purchased a ticket entitling him to ride thereon, the conductor is entitled to have proof of that fact by seeing the ticket. If, being unable to produce it, he refuses to pay fare, he may be ejected; but an actual tender of the fare before the train is stopped, by whomsoever made, must be accepted. Such party becomes a trespasser by a refusal to pay fare when he cannot produce his ticket. *Ham vs. Canal Co.*, 142 Pa., 617. 9. Where a passenger offers to a conductor an excursion ticket good only on a day past, and the conductor refuses to receive it, he is justified in ejecting the passenger, unless he pays his fare. The fact that the company's agents had often carried plaintiff and others on such excursion tickets, even after the limit of time had expired, makes no difference. *McElroy vs. R. R.*, 7 Phila., 206. 10. The plaintiff purchased a round-trip ticket, which was collected by the conductor of the outgoing train, and a conductor's trip check was given by mistake in return. On the return trip the conductor's check was rejected, and the plaintiff was ejected from the train eight miles from her desti-

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nation. The declaration alleged an unlawful ejection of a passenger. Held, that the defendant company was liable in damages. The measure of damages in such case, is such sum as shall compensate the plaintiff for all injury resulting from the ejecting, including bodily and mental suffering, and any physical disability or sickness which directly resulted therefrom, and is not limited to compensation for the inconvenience and expense caused by the delay. *Baltimore & Ohio R. R. vs. Bambrey*, 2 **Monaghan**, 109.

11. Probably where a passenger is negligently put off a train, the company is liable, but not liable where he is maliciously put off. A master is not liable for a wilful trespass committed by a servant in contravention of the express instructions of the master, although the trespass be in the course of a service rendered to the master. *McClung vs. Dearborne*, 24 W. N., 272.

12. Where a passenger took a seat in a sleeping car to which his ticket did not entitle him, and refused, at the request of the conductor, to remove to an adjoining passenger car, or to pay the extra fare demanded, the conductor is justified in ejecting him from the train. A carrier may establish reasonable regulations for the government of its passenger business. *Le Van vs. R. R.*, 5 W. N., 293. *Central R. R. vs. Green*, 2

W. N., 590. 13. The conductor of a train has no right to eject a passenger therefrom while the train is in motion, no matter whether the passenger is rightfully or wrongfully upon the train. If a conductor places a passenger on the platform of a moving car and the passenger is forced therefrom by whatever cause, and sustains an injury, the company will be liable. *Newhart vs. R. R.*, 2 Northampton Co., 374.

14. A trespasser upon a railway train cannot be ejected therefrom without a reasonable regard for his safety, and whether he was thus ejected is a question of fact for the jury. *Arnold vs. R. R.*, 115 Pa., 135.

15. Where injuries result from unnecessary force used in ejecting a passenger who has refused to pay his fare, the railroad company is liable. *Penna. R. R. vs. Vandever*, 36 Pa., 302. 16. The measure of damages in an action

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against a railroad company for wrongfully putting a defendant off a train is not confined to compensation for loss of time, expenses incurred, and the cost of another ticket. The jury should give a fair compensation. *Penna. R. R. vs. Spicker*, 105 Pa., 142. 17. Where the rules of a railroad company had been changed, a passenger who had previously ridden on a freight car without objection for want of a ticket, could not be removed from a car at a distance from the station without proof of express notice or actual knowledge of the rule. *Lake Shore R. R. vs. Greenwood*, 79 Pa., 373. 18. Before the act of March 22, 1867, the separation of black and white passengers in a public conveyance was the subject of a sound regulation to secure order, promote comfort, preserve the peace and maintain the rights of both carriers and passengers. *West Chester R. R. vs. Miles*, 55 Pa., 210. 19. The act of March 22, 1867, was intended to prevent railroad companies making distinctions between passengers on account of race or color. It provides, that where any railroad in the state shall allow its agents or conductors to exclude from its passenger cars any person on account of color or race, or for such reason compel any person to occupy any particular part of any of its cars set apart for the accommodation of passengers, it shall be liable in an action of debt to the injured party in the sum of five hundred dollars. For a single act no double penalty can be imposed. The jury is to determine whether the exclusion was on account of race or color. This law does not prevent railroad companies from making reasonable police arrangements in the management of the road. *Central R. R. vs. Green*, 86 Pa., 421, 427. 20. If a passenger should go into a ladies' car, where smoking is prohibited, and after repeated warnings should persist in smoking there, the conductor would be perfectly justifiable in stopping the train and putting him off. *Le Van vs. R. R.*, 5 W. N., 293.

XXIX. NEGLECT OF SLEEPING CAR PORTER. 1. A sleeping car company is bound to provide reasonable precaution against the valuables of a passenger being stolen from his bed

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or from his clothing while he is asleep. Whether it has exercised such care in a given case is for the jury. Evidence may be received that other passengers in the same sleeping car with the plaintiff were robbed on the same night, such fact indicating lack of proper care by the defendant company. *Pullman Car Co. vs. Gardner*, 3 **Pennypacker**, 78. 2. A sleeping car company is not liable as an innkeeper for the safety of the valuables of passengers while asleep. It is only required to exercise a reasonable and proper degree of care to prevent theft. It is usual for the company to have an employee on guard all night in a position in which he can command a view of the whole aisle. *Pullman Car Co. vs. Gardner*, 14 **W. N.**, 17.

XXX. NEGLIGENCE TO PRODUCE TICKET. 1. A passenger's railway ticket is evidence of the payment of his fare and his right to be carried according to its terms. It does not express the whole contract. The law does not presume that a passenger knows all the rules of the company. A railroad company owes a duty to every passenger who in good faith purchases a ticket and enters its cars. If his ticket does not permit him to ride on that train, the conductor should so inform him and put him off at a proper place. He should not eject him in a dangerous and improper location. *Lake Shore R. R. vs. Rosenzweig*, 113 **Pa.**, 519. 2. Through railroad tickets in the form of coupons, entitling the holder to pass over successive roads usually impart no contract with the company selling the same to carry such person beyond the line of its own road. They are to be regarded as distinct tickets for each road, sold by the first company as agent for the others, so far as the passenger is concerned, and it is the duty of the several companies named therein to honor it until it is used or expires by its own limitation. They are bound by the agreements expressed on the ticket, as to its limit and stop-over privileges. *Young vs. R. R.*, 115 **Pa.**, 112. 3. A railroad company may refuse to carry a passenger without the previous procurement of a ticket, or to charge a higher rate of fare to passengers without tickets, provided a reasonable opportunity has pre-

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viously been afforded them to purchase tickets. *Reese vs. R. R.*, 131 Pa., 422. 4. The plaintiff lost his season ticket by an act of theft; he tendered indemnity and demanded a ticket for the unexpired term; the company refused to give it; he proceeded to ride on the road without a ticket, and was for that cause ejected from the cars of the defendant. The conditions printed on the ticket required its presentation whenever called for by the conductor. Held, that the failure to produce the ticket when called for, justified the conductor in ejecting the passenger from the train. *Cresson vs. R. R.*, 11 Phila., 597. *Biddle vs. R. R.*, 13 W. N., 667. 5. A railroad company has the right to require commuters to show their tickets, and in default to exact the fare without liability to repay it. Even where the ticket has been stolen from the passenger while traveling on the railroad without fault or carelessness on his part, and he offers to prove its loss and to give bond, it will not exonerate him from paying the fare demanded. *Bennett vs. R. R.*, 7 Phila., 11. 6. A passenger purchasing a ticket, is bound to know if the train on which he uses such ticket stops at the station where he wishes to alight. Where he finds that the train will pass the station without stopping, and upon request by the conductor that he pay fare to the next station where the train will stop, refuses, he cannot recover damages for being ejected from the train before reaching the station called for on his ticket. *Caldwell vs. R. R.*, 8 Pa. County, 467. 7. If one without knowledge, that under the rules of the company his ticket is not good for a passage, enters a railway train, he cannot be held as a trespasser; he must be treated as a passenger who by mistake has entered a train upon which by his contract he is not entitled to ride. He cannot be ejected therefrom without a reasonable regard for his safety. *Arnold vs. R. R.*, 115 Pa., 135. 8. A purchaser of a ticket must inform himself of the rules of the railroad company governing the transit and conduct of the trains. If he has a "stop-off" ticket he cannot require a train to be stopped at a station not on its time-table. A general railroad ticket, which any

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holder may use within a reasonable time, does not authorize the holder to stop off at intermediate points. A passenger may resume his journey, where by misfortune or accident, not his fault, it has been interrupted. *Dietrich vs. Penna. R. R.*, 71 Pa., 433. *Oil Creek R. R. vs. Clark*, 72 Pa., 231. 9. A round-trip railroad excursion ticket, not limited by its terms, is good until used, unless the purchaser was personally notified to the contrary at the time he bought it. He is not bound to inquire about regulations of the company not printed on the ticket. *Penna. R. R. vs. Spicker*, 105 Pa., 142. 2 **Lancaster Review**, 52. 10. A regulation of a railroad company, providing that a special excursion ticket shall not be valid for the return journey unless presented by the original purchaser to the authorized agent of the company to be stamped, is not unreasonable, and if the purchaser does not comply with the condition he has no right to use the ticket for the return journey. The fact that the gateman permitted the passenger to go through the gate without examining the ticket, was not evidence of the waiver of the condition. *Bowers vs. R. R.*, 158 Pa., 302. 11. Where the holder of a monthly book of tickets sold at a reduced rate seeks to recover for the unused portion, the contract is rescinded and the holder is placed in the position of one traveling in the ordinary way. Even if the act of May 6, 1863, which compels transportation companies to redeem unused tickets, did apply to the case, plaintiff could not recover in this case, as she had used enough of the tickets to equal what would have been the ordinary rate of fare for the rides taken. *Smith vs. R. R.*, 8 Montgomery Co., 50. 12. Under the act of May 6, 1863, amended by the act of April 10, 1872, it is unlawful for any unauthorized person to sell, barter or transfer the whole or any part of a ticket on a railroad, steamboat or other conveyance. It is a misdemeanor, and the law prohibiting it is constitutional. *Comm. vs. Wilson*, 9 W. N. 291. 14 Phila., 384. 13. By the act of May 6, 1863, any unauthorized party, who shall sell or transfer for any consideration the whole or any part of a rail-

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road ticket, shall be guilty of a misdemeanor and liable to fine and imprisonment. The purchasing and using such ticket is not made an offence. But if the ticket be purchased in another state where such sale is lawful, the purchaser may maintain an action in the courts of Pennsylvania for the refusal of a railroad company to carry him in pursuance of the terms in the ticket from a station in the state where the ticket was purchased to a station in this state. *Sleeper vs. R. R.*, 100 Pa., 259.

XXXI. NEGLECT OF HOLDER OF FREE PASS. 1. A party traveling on a free pass does not make the person using it a trespasser, or prevent him from recovering damages for injuries caused by the negligence of the company. He may recover damages notwithstanding a condition in the pass, that the person accepting it assumes all risk of accident to his person or property without claims for damages on the corporation. A common carrier cannot protect himself by special contract from liability for negligence. *Buffalo R. R. vs. O'Hara*, 3 Pennypacker, 190. 12 W. N., 473. 2. An endorsement on a free pass issued by a railroad company and acquiesced in by a passenger traveling upon it, that the traveler assumes all risks of accidents, and expressly agrees that the company shall not be liable for any injury to his person or property through the negligence of its servants, is null, and is no excuse for negligence on the part of the company. *Penna. R. R. vs. Henderson*, 51 Pa., 315. 3. In no state will a railroad company be exempted from liability for negligence by reason of a mere notice upon a pass or ticket, that the person accepting or using it thereby assumes all risk of accident and damage to person or baggage, when it appears that such pass was not a gratuity, but was founded upon an actual consideration. *Baush vs. R. R.*, 18 Phila., 392. 4. One who travels upon a railroad company's train, under a contract relation, as upon a drover's pass, cannot be other than a passenger. *Anthony vs. R. R.*, 3 York Record, 71. 5. That the plaintiff was riding on an employee's pass, was a presumptive admission by him that he was a servant of the company. It was not con-

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clusive, however, if explained so as to show he was not really in the employ of the company. Every one riding in a railroad car is presumed to be there lawfully as a passenger, and the *onus* is on the carrier to prove that he is a trespasser. *Penna. R. R. vs. Books*, 57 Pa., 339.

XXXII. NEGLIGENCE IN CONSTRUCTING STATION PLATFORMS.

1. If a railroad company constructs the platforms at its stations in such a manner that they can be used without danger by passengers using ordinary care, then the company has done its duty in the matter. *Graham vs. Penna. R. R.*, 139 Pa., 149.
2. It is not negligence to construct a platform at a railroad station in two parts, one division being raised a step above the other. All that is required is that the platform should be reasonably safe for the use of passengers displaying ordinary care. *Graham vs. R. R.*, 27 Pa., 297.
3. A station platform necessarily has to project near the rails of a railroad. Its construction does not necessarily make it dangerous. It is negligence, however, for a person to stand so near the edge of such platform as to be struck by a passing engine. *Matthews vs. R. R.*, 148 Pa., 491.
4. It is the duty of a railroad company to construct the platform of its stations in a careful manner for the protection of its passengers. If light is necessary, it is its duty to provide it. *McCollin vs. R. R.*, 1 Delaware Co., 445.
5. It is the duty of railroad companies to keep the platforms of their stations properly lighted at night, so that approaching trains can be seen. *Bell vs. R. R.*, 4 Lancaster Review, 201.
6. The platform at a railroad station is in no sense a public highway. It is not dedicated to public use. It is for the accommodation of passengers, and, being unenclosed, persons have the privilege but not the legal right of walking over it for other purposes. They may be compelled to remove from it, after request made to do so. The company, however, would be liable for any wanton or intentional injury done to a trespasser. To persons who come upon a platform to meet or part with passengers, the company is bound to have the structure strong enough to sustain their

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weight. The company is not liable for injury sustained by the breaking down of the platform, owing to the pressure upon it of a vast crowd, who have congregated there to witness the passing of prominent individuals. *Gillis vs. Penna. R. R.*, 59 Pa., 129. 17 *Pittsburg Journal*, 5. 7. The measure of the duty of a railroad company toward a person who is on the platform of a station, and who is about to become a passenger, is that the company must take all the care for his safety that foresight can suggest. It is not responsible, however, for injuries to such party, of which it is not the proximate cause. *Wood vs. R. R.*, 36 W. N., 410. 8. Where a party, after being warned of the approach of a fast train, which will not stop at the station, remains on a dangerous portion of a railroad platform, awaiting the arrival of a way train, and is struck and killed by the engine of the passing train, which ordinary caution on his part would have avoided, his widow cannot recover in an action against the company. *Penna. R. R. vs. Henderson*, 43 Pa., 449. 51 Pa., 315. 9. Special care should be exercised at public crossings and depots by passing trains. A rule of the Pennsylvania Railroad requires that trains approaching stations on double tracks, where a passenger train may be standing, receiving or discharging passengers, must be stopped before reaching the passenger train, and not go forward until the passenger train moves on, or signal is given to come on. *Penna. R. R. vs. White*, 88 Pa., 333. 10. Where a person about to board a railroad train at night was warned of its approach to the station, could have heard it and could have seen its headlight for a long distance, but walked to the edge of the platform and was struck by the locomotive, he is chargeable with contributory negligence, whether intoxicated or not. The fact of collision was the result of his purely voluntary act of placing himself so close to the track as to be struck by the passing car. *Penna. R. R. vs. Bell*, 122 Pa., 58. 11. Where two railroad companies occupied two sides of the same platform, and by arrangement tickets were sold to pass over each other's road,

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it was the duty of both companies to give a reasonable time for the transfer of passengers and their baggage. The passenger was not responsible for the mistake of the conductor of the arriving train in signalling the departing train that there were no passengers for it, which caused the premature starting of the second train, just as the passenger was boarding it, which resulted in his being thrown off and injured. *Johnson vs. West Chester R. R.*, 70 Pa., 357.

XXXIII. NEGLIGENCE TO PROTECT CHILDREN. 1. To a child of tender years, no contributory negligence can be imputed. A person not in charge of an infant took it in her arms to protect it, and fell with it on the railroad track, where the child was injured by the engine, which was managed by a negligent engineer. Held, that the child was not precluded from recovery against one joint *tort-feasor*, because others had borne a share in it. Torts by several persons are joint or several, at the election of the injured party, but only one satisfaction can be recovered. There is no contribution amongst *tort-feasors*. The child in this case may sue the railroad company, as well as the party who unintentionally occasioned the injury. *North Penna. R. R. vs. Mahoney*, 57 Pa., 187. 2. It is true that negligence cannot be imputed to one who has not sufficient capacity or discretion to understand the danger, and to use the proper means to guard against it. When, therefore, an injury has been inflicted upon a child of tender years, the incapacity of the child to know the danger and avoid it shields it from responsibility. At what age must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to a jury, which would give a mere shifting standard. It is a question of law for the court. The law indicates that fourteen in males and twelve in females is the age of discretion. A boy of that age is guilty of negligence in attempting to cross a railroad track in front of a moving train. This is certainly the case where he was a lad of fair intelligence and physical strength. *Nagle vs. Allegheny Valley R. R.*, 88 Pa., 35. 3. A child's capacity

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is the measure of its responsibility. If he has not the ability to foresee and avoid danger, negligence will not be imputed to him. Where a child of six years tried to cross a street in front of a train of cars about to start, it was the duty of the railroad employees to give him notice of the starting of the train. *Phila. & Baltimore R. R. vs. Layer*, 112 Pa., 414. 4. In a suit by a child of tender years for personal injury, the defence of contributory negligence will not avail. In a suit by father or mother for the death of a child, contributory negligence of the parent is a defence. The duty of paternal protection is imperative ; a child being on a railroad track without a protection offers presumptive evidence of entire neglect of that duty. A city has power to pass ordinances regulating the running of trains through it, although the tracks be not on the lines of streets. A person of sound mind who has reached the years of discretion ventures on a railroad track at his own peril, for he has no right to be there ; but no negligence is attributable to a young child. *Penna. R. R. vs. James*, 81x Pa., 194. 5. While negligence cannot be imputed to a child of six years, yet it may be assumed that a child old enough to be trusted to run at large, has discretion enough to avoid ordinary danger. Where such child attempted to mount the front platform of a car in motion, while the driver, who was also the conductor, was within the car collecting fares, and was injured, without the fault of the driver, the railroad company is not responsible therefor. *Hestonville R. W. Co. vs. Connell*, 88 Pa., 520. 6. In an action for damages to a boy of tender years, who was a trespasser on one of the cars of a freight train, and was injured while complying with the order of the conductor to get off, held, that the plaintiff could not recover. *Cauley vs. R. R.*, 27 Pittsburgh Journal, 218. 7. Plaintiff, a lad of fifteen, was in the employ of the defendant company. In trying to get on a moving engine, he was knocked under the wheels and injured. Held, that the same accountability was required of him as an adult, and he was guilty of contributory negligence in not first getting on the tender, and from thence

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in safety to the engine. *Hausman vs. R. R.*, 3 Lancaster Review, 257. 8. When a boy, six years of age, climbed, at the invitation of other boys, on a freight train, and fell therefrom, losing his life thereby, held, that in the absence of any evidence showing negligence on the part of the railroad company or its employees, a judgment of nonsuit was rightly entered in a suit for damages brought by his parents. *Woodbridge vs. R. R.*, 16 W. N., 55. 33 **Pittsburg Journal**, 57. 9. In an action by a minor, seven years old, against a railroad company, to recover damages for alleged negligence of the company, plaintiff offered to prove that he, being on a low sand car standing on a switch, the conductor ordered him off while the car was in motion, whereby he was injured. Held, that the plaintiff being a trespasser and no negligence of the company being shown, the offer was properly rejected. *Cauley vs. R. R.*, 11 W. N., 164. 10. A child of six years, accustomed to board the cars on a street while they were in motion to sell his wares, is guilty of contributory negligence in attempting to get on the front platform of a moving car. *Smith vs. R. W. Co.*, 13 Phila., 6. 11. A boy was permitted by a conductor to ride on the train of a railroad company, to sell newspapers, in violation of the regulations of the company, and was killed by an accident. Held, that the boy was a mere trespasser, and the company was not liable. *Duff vs. R. R.*, 91 Pa., 458. 12. At a water station on a railroad, a fireman asked a small boy to turn on the water. Whilst he was climbing on the tender to adjust the hose, the remainder of the train came down with ordinary force and struck the car attached to the engine; the jar threw the boy under the wheel, and he was killed. In an action by the parents for his death, held, that it not being in the scope of the fireman's employment to ask any one to come on the engine, the railroad company was not liable. *Flower vs. Penna. R. R.*, 69 Pa., 210. 13. A lad was employed by a coal dealer to unload cars standing upon a siding constructed by the dealer upon his own land. Owing to the

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neglect of the railroad employees to change the switch leading to the siding from the main track, several cars were propelled upon the siding, and, colliding with the cars on which the lad was employed, injured him. In a suit against the railroad for damages, held, that the lad was an employee of the company within the terms of the act of April 4, 1868, and could not recover. *Cummings vs. R. R.*, 92 Pa., 82. 14. Where two small boys were riding on the rear car of a freight train by permission of the brakeman, and, without the knowledge of the latter, invited a boy of six years to join them, which he did and lost his life thereby, held, that there was no evidence of negligence of the company's servants in relation to the boy killed as to warrant the submission of the case to the jury, and that a nonsuit was properly granted. If the brakeman gave the other boys permission to ride upon the car, he transcended his authority and did a very imprudent and improper act, but it so happened that no harm befell either of them. *Lackawanna Co. vs. Stevens*, 105 Pa., 460. 15. Where a small child was hidden behind some standing cars upon the private property of the railroad company, distant from the street, it was not negligence for the engineer of another train to back against the cars behind which the child was standing, though it resulted in injury to the child. *Clark vs. Phila. & Reading R. R.*, 5 W. N., 119. 16. Where a small child while standing upon the curbstone of a narrow city street, was struck by the axle of a passing freight car drawn by a team of mules which were walking, the court should not have submitted the question of defendant's negligence to the jury, as no evidence of such negligence was shown. *Phila. & Reading R. R. vs. Heil*, 5 W. N., 91. 17. A mere trespasser, a person who steals a ride on a train, or who is employed thereon, is not a passenger within the act of April 4, 1868, and is not entitled, as such, to protection. A passenger is one who travels in a public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare or its equivalent. *Penna. R. R. vs. Price*, 96 Pa., 256. 18. Dam-

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ages will not be awarded even to a child of tender years for injury occasioned by the movement of an unattached car, if such party was a trespasser upon the tracks of a railroad. *Mitchell vs. R. R.*, 132 Pa., 226. *McMullin vs. R. R.*, *Idem*, 107. 19. Where a child of tender years was killed at a grade crossing, the case is for the jury, where there is evidence that the location of the accident was in a populous district, and that no safety gates were maintained. *Lederman vs. R. R.*, 165 Pa., 118. 20. Where a boy of ten years was forcibly carried on a freight train by its brakeman a distance of five miles, and returned home on foot, became sick and permanently crippled in both legs, held, that the action of the brakeman was a trespass, and it was for the jury to decide whether the sickness of the lad resulted from the act of the brakeman. *Drake vs. Kiely*, 93 Pa., 492. 21. A boy aged five years amused himself by standing on the edge of a railroad platform watching an approaching train. As it slowly passed the platform, a projecting piece of iron caught the boy and knocked him under the wheels. In an action by the boy against the company, it was held, that the company was not guilty of negligence. *Baltimore & Ohio R. R. vs. Schwindling*, 101 Pa., 258. 22. Where a car was negligently pushed over the end of a track, and fell into a passage way below, killing a boy who had been warned to keep out of the passage owing to the moving of wheelbarrows and trucks from a mill, it was held that the warning was not contributory negligence on the boy's part in regard to the car, unless there was some reason to expect danger from the cars overhead. *Gray vs. Scott*, 66 Pa., 345. 23. Except at public crossings, where the public has a right of way, a railroad company has the exclusive right to its track, and it owes no duty to the father of a child of tender years trespassing thereon, nor to the child itself. Parents who permit their children to trespass upon a railroad track are guilty of contributory negligence, and the fact that the trespass was without the knowledge of the parents, is not material. *Cauley vs. R. R.*, 95 Pa., 398. 24. Railroads

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are not liable for injuries inflicted by passing trains on persons walking upon their tracks, even though such persons be of tender years. The duty of the railroad company to them is no greater than to adults. *Moore vs. R. R.*, 11 W. N., 310. 25. If the plaintiff, though an infant, was unlawfully on the railroad track, the defendant is not liable. *Crawford vs. R. R.*, 5 Phila. 359. *Clark vs. R. R.*, 1 W. N., 315. 26. In an action against a railroad company for injuries to a child of ten years, who, neither seeing nor hearing an approaching train, ran on the track at a public crossing in quest of his hat, and was injured, held, that it was for the jury to decide whether warning was given on the approach of the train to the crossing. *Wilson vs. R. R.*, 132 Pa., 27. 27. If the appearance of a child on a railroad track is so sudden and unexpected that the engineer is incapable of exercising the necessary measure of care to save it, the child is without remedy. It is for a jury to say, whether it is negligence not to stop even in the case of a child upon the track. *Penna. R. R. vs. Morgan*, 82 Pa., 141. 28. Where a child attempted to cross the track of a railroad at a point where there was no public crossing, and was struck by a passing engine, there can be no recovery of damages, unless there was negligence on the part of those in charge of the engine. While the same degree of caution is not required of a child as of an adult, yet parents in the vicinity should see to the safety of their young children. *Philadelphia & Reading R. R. vs. Spearen*, 47 Pa., 300. 29. If a child of nine years, walking on the railroad track by consent of his parents, had sufficient judgment and discretion to know his danger, and did not exercise the ordinary care that one of his age should, he was guilty of such negligence as would prevent him from recovering. His parents were guilty of contributory negligence, in permitting their son to walk upon the railroad track. *Penna. R. R. vs. Lewis*, 79 Pa., 33. 30. A child of eight years of age will not be held to be guilty of contributory negligence. When it is shown, that a footpath across a railroad track has been habitually used by the public for many years

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without objection, it owes the duty of reasonable care towards those using the crossing. A child using such footpath is not a trespasser. *Taylor vs. Canal Co.*, 113 Pa., 162. 31. Where a boy of ten years of age rashly trespassed on the track of a railroad by walking on the ends of sleepers projecting from beneath the track, and was run over and killed by a passing train moving at a very rapid rate of speed and without whistle or other signal, held, that the railroad company was not liable, for it is under no obligations to take precautions against any class of persons who may walk on its tracks. The rule is in nowise relaxed, although the trespasser be a child of tender years. *Moore vs. R. R.*, 99 Pa., 305. 32. A school-boy, ten years of age, was seen walking down a street which crossed the railroad. When next seen he was lying under the wheel of a car about a quarter of a square from the crossing. There was nothing to show how the accident happened. The boy died from the injuries received. In an action by the father for damages, it was proved that the train could be readily seen for some distance from the crossing. A nonsuit was entered. *Ogden vs. R. R.*, 23 W. N., 191. 33. If a mother permit a child of tender years to pass, cross and stand on a railroad crossing, the father of the child cannot recover damages from the company for injuries to the child, the result of such contributory negligence. *Cato vs. R. R.*, 30 *Pittsburg Journal*, 18. 34. Parents, who suffer their young children to wander along the tracks of a railroad, where they are killed by an engine, are guilty of such contributory negligence as will prevent a recovery of damages. The track of a railroad is always a place of danger, and is known to be such by every one. *Westerberg vs. R. R.*, 142 Pa., 471.

XXXIV. NEGLECT TO PROTECT EMPLOYEES. 1. Where an accident happened on a railroad from a cause entirely unexplained, it cannot be charged to a faulty condition of the track, but must be regarded as one of the ordinary risks of the business for which there is no liability. *Erie & Wyoming Valley R. R. vs. Smith*, 23 W. N., 511. 2. An employee of

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a railroad company assumes the risk of his employment, and where certain work is assigned him, the danger of which is well known to him, and he enters upon such labor with a full knowledge of facts, he has no right of action against the company for injuries received thereby. *Kennedy vs. R. R.*, 24 W. N., 371. 3. A servant or employee of a railroad company assumes all the risk of all the dangers of his employment, however they may arise, against which he may protect himself by the use of ordinary observation and care. If he fails to use and exercise ordinary care to protect himself against danger, and suffers, he cannot complain. *Bentley vs. Cranmer*, 137 Pa., 246. 4. Plaintiff, while employed by a railroad company to remove the flooring of trestles, had to pass over the partially dismantled structure. In doing so, he stepped upon a beam, apparently solid and fixed, but really insecure, which tilted up, threw him to the ground, and injured him. Held, that the injury was one of the risks of plaintiff's employment, and that he could not recover damages from the company. *Moore vs. R. R.*, 167 Pa., 495. 5. Plaintiff was a flagman employed to protect the rear of a long freight train. While stooping to uncouple the pin which connected the rear car with a pushing engine, the train gave a jerk on crossing the summit of a mountain, resulting in his being thrown from the car and the engine in the rear passing over his legs. Held, that as plaintiff had assumed the risk of his employment, he could not recover damages from the railroad company. *Davis vs. R. R.*, 152 Pa., 314. 6. A trackman employed by a railroad to repair its tracks at a point where trains are frequently passing and repassing, or a laborer employed to load wheels on a car, take the risk of their employment, and in the event of being killed by a passing train, no recovery can be had for their death. *Kennedy vs. R. R.*, 1 *Monaghan*, 271. *Goldwitzer vs. R. R.*, *Idem*, 72. 7. During work by a railroad company in a tunnel, dynamite was stored near its entrance. An explosion took place, and an employee was killed. In a suit by the widow of the workman against the company, the

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question of negligence should have been submitted to the jury. *Tissue vs. R. R.*, 34 **Pittsburg Journal**, 38. 8. Sleeping while on duty constitutes negligence *per se*. A habit of violating rules is no defence. The most care is required where the most danger is to be apprehended. *Comm. vs. Griffin*, 3 Brewster, 554. 9. Where an employee of a railroad company was engaged in repairing a car in the yard of the company, and knew that shifting engines were liable to run in said yard, and that he should have placed a red flag on the car he was repairing, to warn engineers, but failed to do so, whereby he was injured, he cannot recover damages. *Cypher vs. R. R.*, 149 Pa., 359. 10. A car inspector is guilty of contributory negligence when he goes under a car standing on a switch, at an hour when he knows that a train is usually run on the switch, and makes neither inquiry nor observation. *Mareau vs. R. R.*, 167 Pa., 220. 11. Damages were awarded a workman who was employed by a railroad company to repair the roof of a car which was standing on a siding, and was struck by a moving engine of the approach of which he had no warning, resulting in his injury. *Stoltenberg vs. R. R.*, 165 Pa., 377. 12. The crew of an engine of one railroad company causing the death of an employee of another company using a portion of the road of the former, renders such railroad company liable in damages. *Penna. R. R. vs. McHugo*, 25 **Pittsburg Journal**, 122.

XXXV. NEGLECT TO PROVIDE SAFE APPLIANCES. 1. The duty of a railroad company to exercise ordinary care in suitable appliances and machinery to be operated by its employees, does not require the adoption of the best machinery which can be procured, or that which combines the latest devices or improvements, but such only as is reasonably safe and in common use. *Phila. & Reading R. R. vs. Hughes*, 119 Pa., 301. 2. While a railroad company is bound to furnish its employees with ordinarily safe tools and machinery, the mere fact that a car which was the cause of the employee's injury was in an unsafe condition, is not *prima facie* evidence of

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negligence on the part of the employer. To warrant a jury in finding negligence, the evidence should show that the employer had previous knowledge of the condition of the car, or ought to have had such knowledge, and failed to repair the defect within a reasonable time. *Mensch vs. R. R.*, 150 Pa., 598. 3. A railroad company is bound to exercise reasonable care in providing strong brake chains, and in maintaining and repairing them, and will be liable for the death of an employee, occasioned by a failure to perform its duty in this respect. *Phila. & Reading R. R. vs. Agnew*, 4 **Luzerne Law Times, N. S.**, 171. 11 **W. N.**, 394. 4. It is the duty of a common carrier to provide a vehicle in all respects adapted to the purpose of carriage, and so constructed as to be able to encounter the ordinary risks of transportation. It must be perfect in all its parts. *Empire Transportation Co. vs. Oil Co.*, 18 **Pittsburg Journal**, 65. 5. A railroad company using a defective car in the ordinary operations of the road, is liable to its employees for negligence. The company is bound to their employees to furnish them with cars in good repair, and provided with the usual and proper appliances to provide safety in the handling of them. On the other hand, employees assume at their own risk the ordinary dangers of their employment, and if one knows a car to be unsafe to handle, he should refuse to put himself in a dangerous position. *Burkdoll vs. R. R.*, 3 *Montgomery Co.*, 63. 4 *Idem*, 69. 6. A railroad company is bound to make such inspection of its own cars and of cars received from another railroad as the nature of transportation requires, and if it uses cars that are faulty in construction, or dangerously out of repair, it is answerable to its own employees who are thereby injured. It is not required to move defective cars from other roads. *Dooner vs. Canal Co.*, 164 Pa., 17. 7. In an action against a railroad company for the death of a brakeman, the negligence charged was the use of a broad-gauge car body upon a narrow-gauge truck, not adapted thereto. It appearing that this arrangement was usual, and

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that the brakeman accepted his employment with full knowledge of such practice and the risks incidental thereto, held, that his representatives were not entitled to recover. *Titus vs. R. R.*, 136 Pa., 618. 8. In an action to recover damages against a railroad company for the death of an engineer upon its road caused by the explosion of a boiler which had recently come from the repair shops of the company and had been insufficiently repaired; the company is not exempt from liability on the allegation that the workmen in the repair shop were fellow-workmen of the deceased. *Penna. & N. Y. Canal Co. vs. Mason*, 109 Pa., 296. 9. Where the officers of a railroad company knew that the brake upon a car was defective and dangerous, and negligently omitted to repair it, and where such defect was unknown to the brakeman, who was injured in attempting to use it, the question of damages is for the jury. *Philadelphia & Reading R. R. vs. Huber*, 128 Pa., 64. 10. Where an employee in a coal yard knew of the defective condition of the brakes on a coal car, and through the negligence of a fellow-employee was injured by the car becoming unmanageable, he cannot recover damages. *Rehm vs. R. R.*, 164 Pa., 91. 11. In the absence of testimony showing negligence in the selection of car inspectors, either as to number or qualifications, or a knowledge by officers of a railroad company of the faulty condition of a car axle, which broke and caused the death of a section hand, who was repairing the track, a compulsory nonsuit is rightly entered in a suit for damages for alleged negligence causing such death. *Becker vs. R. R.*, 3 Northampton Co., 402. 12. In trespass against a railroad company charging negligence resulting in the death of an employee while operating a shunting appliance on a shifting engine, by which the standard broke off in the socket, there being no proof of negligence on the part of the company, a nonsuit was proper. *Hartman vs. R. R.*, 144 Pa., 345.

XXXVI. NEGLECT ON THE PART OF CO-EMPLOYEES. 1. It is now settled in Pennsylvania, that when several persons are

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employed as workmen in the same general service, though in different parts of it, and one of them is injured through the carelessness of another, the employer is not responsible, unless he had employed unfit persons for his service. *O'Donnell vs. Allegheny Valley R. R.*, 59 Pa., 246. *Baldwin vs. R. R.*, 2 Lancaster Bar, 15. *Catawissa R. R. vs. Armstrong*, 49 Pa., 186. 2. A railroad company is not guilty of negligence, where an employee is injured or killed in a collision, while in the discharge of his duties, which results from a violation of the rules of the company by his fellow-workmen. There is no presumption of negligence on the part of a railroad company, where an accident occurs to an employee, and he must prove affirmatively the fact of negligence. *Cole vs. R. R.*, 12 Pa. County, 573. 6 York Record, 162. 3. A railroad company is not liable to a servant for the negligence or want of skill in another person employed by them, unless there be fault in employing unsafe machinery, or in the selection of the wrong-doer, or perhaps retaining him after he has proved incompetent. *Weger vs. Penna. R. R.*, 55 Pa., 460. 4. For the carelessness of an employee, resulting in injury to a fellow-workmen, the employer is not liable. The actual wrong-doer alone is responsible. *Ryan vs. R. R.*, 23 Pa., 384. 5. A railroad laborer, injured by the breaking of a chain which the foreman of the gang required them to use when he knew it was defective, cannot recover therefor from the railroad company, the negligence being that of the foreman, the fellow-servant of the plaintiff. *Kinney vs. Corbin*, 132 Pa., 341. 6. Where a main trunk railroad company furnishes the motive power, engineers and conductors to transport the cars of an intersecting railroad company on its road, it is responsible for an injury done to a brakeman employed by and on the cars of the intersecting company, through the negligence of its engineer. Such brakeman is not an employee of the first-named company, so as to protect it from responsibility. *Smith vs. R. R.*, 1 Pearson, 243. 7. A railroad company is not liable for the negligence of an

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employee for his failure to notify a gang of fellow-workmen, who were repairing a track, of an approaching train. *Shea vs. R. R.*, 36 **Pittsburg Journal**, 71. 8. It is only for negligence of the company itself endangering his safety, that an employee can complain, and not that of his fellow-employees. *Orrison vs. R. R.*, 24 **Pittsburg Journal**, 37. 9. A federal mail agent, when traveling on railroad trains in pursuance of his duties, is not a passenger, and if killed through the negligence of employees of the railroad company, his heirs cannot recover damages, the rule being that no recovery can be had for the negligence of a fellow-servant. *Penna. R. R. vs. Price*, 28 **Pittsburg Journal**, 197. 10. Where a laborer, employed on a railroad gravel train, was injured through the carelessness of a conductor or engineer employed by the same company, by the dumping of one of the cars, the railroad employer is not liable. The action will lie only against the actual wrongdoer. *Ryan vs. R. R.*, 23 **Pa.**, 384. 2 **Pittsburg Journal**, 148. 11. Where, through the neglect of an engineer and a conductor, a train was started from a station without orders, resulting in a collision, whereby a brakeman was injured, held, that the railroad company was not liable to an employee for what was the result of the negligence of a co-employee; and this rule is not changed by reason of the co-employee being worn out with continuous service, if the negligence which caused the injury did not arise from his exhausted condition. *Johnson vs. R. R.*, 114 **Pa.**, 443. 12. Plaintiff's minor son was killed on a truck which was located in front of a backing construction train used in laying track. The boy was placed there by direction of the foreman to aid in the work. The foreman being a co-employee, damages for the boy's death could not be recovered against the company, which employed both parties. *Enlhock vs. R. R.*, 169 **Pa.**, 592. 13. In an action by a conductor against his employer, a railroad company, for personal injuries, it is proper to submit evidence to the jury, that the accident was caused by the negligence of a flagman, who was habitually careless, and whose unfitness for the position was long known

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to the company. *Hughes vs. R. R.*, 164 Pa., 178. 14. A brakeman employed in dropping cars into a railroad company's yard, is a fellow-servant with a party making repairs to tracks in the same yard, in such a sense that the common employer is not responsible to one for injury caused by the negligence of the other. *Campbell vs. R. R.*, 33 **Pittsburg Journal**, 359. 15. Where an engineer, in disregard of a special order given him, negligently runs into a passenger train ahead of him moving on schedule time, and kills a brakeman on that train, the brakeman's widow cannot recover damages from the company, since the accident was caused by the negligence of a fellow-servant of the deceased. *Kennelty vs. R. R.*, 166 Pa., 60. 16. A locomotive engineer on a railroad train was killed by reason of the failure of a night telegraph operator to hand to the conductor of the train a telegram warning him to go slowly in consequence of a switch being turned. Held, that the accident had been caused by the negligence of a co-employee of the deceased party, and that, therefore, there could be no recovery. *Dealey vs. R. R.*, 21 W. N., 45. 17. Although it is settled, that where several workmen are employed in the same general service, in prosecuting which one of their number is injured through the carelessness of another, the employer is not responsible; yet where the defendant, a railroad company, knowingly employed an unfit conductor, it was not error to instruct the jury that, this fact being established, the company was chargeable with the consequences of the conductor's carelessness. *Frazier vs. Penna. R. R. Co.*, 38 Pa., 104.

XXXVII. NEGLECT OF FELLOW-SERVANT UNDER THE ACT OF APRIL 4, 1868. 1. The act of April 4, 1868, provides, " That when any person shall sustain personal injury or loss while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such

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person were an employee ; provided that this section shall not apply to passengers." *Fleming vs. R. R.*, 134 Pa., 478. *Rickard vs. R. R.*, 3 W. N., 517. 89 Pa., 123. *Kirby vs. R. R.*, 76 Pa., 508. *Penna. R. R. vs. Price*, 96 Pa., 256. 189 Pa., 123. *Mulherrin vs. R. R.*, 81 Pa., 367. *Gerard vs. R. R.*, 5 W. N., 251.

2. Under the act of April 4, 1868, if the place of an accident where a person is injured is for general purposes, the premises of a railroad company, the person injured is a fellow-servant of the employees of the company, if he is lawfully engaged or employed on or about them, and is not a passenger. But if the work has no relation to railroad work, and is connected with the railroad only by immaterial circumstances of locality, the case is not within the statute. *Spisak vs. R. R.*, 152 Pa., 281.

3. A person employed by the individual owner of cars run on a railroad, under a contract with the railroad company, is, when in charge of the cars, an employee of the railroad company within the meaning of the act of April 4, 1868. *Miller vs. R. R.*, 154 Pa., 473.

4. A party engaged in hauling iron which had been dumped by a railroad company between the two tracks of a siding, and which was to be conveyed by the plaintiff to a mill where it belonged, is not to be placed on the footing of an employee of the railway company under the act of 1868. If by the negligence of employees of the company in shifting cars on such tracks without warning of their movements, the plaintiff is injured without negligence on his part, he has an action for damages. *Christman vs. R. R.*, 141 Pa., 604.

5. In an action for damages for the death of an employee of a contractor to widen the road-bed of the railroad company defendant, the evidence showed that he was killed by a passing train, which gave no signal while he was wheeling material on the tracks. The court properly entered a nonsuit on the ground that the case was within the act of April 4, 1868. *Fleming vs. R. R.*, 2 **Monaghan**, 743.

6. The negligence of a flagman in not notifying a teamster, who was hauling freight to a car on a railroad, of the approach of a train, which, as a result, struck his wagon and injured him, did

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not make the company liable. *Balt. & Ohio R. R. vs. Colvin*, 118 Pa., 230. *Stone vs. R. R.*, 132 Pa., 206.

XXXVIII. NEGLIGENCE OF CONDUCTOR OF TRAIN. 1. When a railroad company knowingly employs a conductor who is unfit for the business, it is chargeable with the consequences of the conductor's negligence, even to one employed in the same general service. Knowledge of the superintendent, possessing general powers, is knowledge of the company. Proof is admissible of such conductor's accustomed disobedience of orders and of his habitual drunkenness. In the present case, an engineer of the road lost his life as the result of a collision occasioned by the reckless conduct of a conductor in running his train in defiance of written orders. *Huntingdon & Broad Top Coal Co. vs. Decker*, 82 Pa., 119. 2. Where a conductor employed on a train is habitually intemperate and unfit for such service, and his habits are known to the superintendent of the railroad, entrusted with power to employ and discharge, and who employed and retained him in its service, the company is liable in damages for the death of a fellow-employee resulting from the carelessness and incompetency of such conductor. *Huntingdon R. R. vs. Decker*, 84 Pa., 419. 3. In an action for injury caused by the collision of trains, evidence of the habits and competency of the conductor of a train is pertinent. When a habit of intoxication in a conductor is shown, it raises a presumption of negligence in case of accident. *Penna. R. R. vs. Books*, 57 Pa., 339. 4. The conductor of a railroad train has control of the train and all persons on it, with authority to preserve order and to employ all the trainmen and passengers willing to assist, for these purposes. It is his duty to protect passengers not only from injury by negligence or accident, but also from violence, annoyance and interference by other parties. *Duggan vs. R. R.*, 159 Pa., 248. 5. A conductor of a train has large powers at his disposal to preserve order in the car and expel disturbers of the peace. He may stop the train and call to his assistance firemen, brakemen and passengers willing to help. *Pittsburg R. R. vs.*

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Hinds, 53 Pa., 512. 6. The slightest degree of negligence on the part of the conductor of a car, resulting in injury to a passenger without fault on his part, will render the company liable. The legal presumption of negligence by the carrier can be rebutted by showing that the injury arose from an accident, which the utmost skill, foresight and diligence could not prevent. Conductors on cars have control over passengers, and may repress all disorderly conduct in their cars and expel the guilty parties. Drunken men should not be permitted on the cars, or should be separated from the orderly part of the passengers. *Pittsburg R. R. vs. Pillow*, 76 Pa., 510. 7. Two drunken men engaged in a quarrel in a car occupied by the plaintiff, and the latter lost an eye thereby. Held, that the company was liable, as it was the clear duty of its employees to repress all disorderly conduct in the cars. *Pittsburg & Connelsville R. R. vs. Pillow*, 22 **Pittsburg Journal**, 98. 8. A conductor will not be held to have contributed to his own death by going from the cars of his train to the locomotive to give cautionary instructions. *Somerset R. R. vs. Galbraith*, 33 **Pittsburg Journal**, 384. 9. If a conductor acting in the line of his duty does an act in a careless, negligent or reckless manner, the company is liable for his act; but for his unauthorized, wilful and wanton or malicious trespass, the company is not liable. *Penna. Co. vs. Toomey*, 91 Pa., 259. 10. A conductor cannot waive a rule which by its very terms he is commanded to enforce. He may neglect to enforce it, and where the rule is mere police arrangement of the company, such neglect may amount to a waiver as between the passenger and the company. But when the rule is for the protection of human life, the case is very different. The conductor cannot, in violation of a known rule of the company, license a man to occupy a place of danger so as to make the company responsible. *Penna. R. R. vs. Langdon*, 92 Pa., 21. 11. Where a rule of the company directed the conductors of its freight trains to take their position in the middle of a train when it

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was going down grade, held, not to be contributory negligence on the part of a conductor in going forward to the engine to give some important directions to the engineer. While a conductor should be held to a reasonable observance of rules, still he has a general duty and discretion to use his judgment for the safety of his train in case of an emergency. *Somerset & Cambria R. R. vs. Galbraith*, 109 Pa., 32. 12. A railroad company cannot shield itself from the consequences of its negligence, by showing that a person injured obeyed specific instructions of the conductor, instead of general directions, of which he had been informed. *Penna. R. R. vs. McCloskey*, 3 *Pittsburg Journal*, 25. 13. When a conductor pays out an illegal note in change to a passenger, the penalty cannot be recovered from the railroad company, without proof that such company authorized the act. A servant of a corporation, who does an act forbidden by law, is responsible for it in his own person. *Comm. vs. Ohio R. R.*, 1 *Grant*, 329.

XXXIX. NEGLIGENCE OF TRAIN DESPATCHER. 1. A train despatcher wielding the authority of a railroad company in the moving of trains and in the changing of schedules, is not a fellow-servant with the train employee; and for his negligence, which is the proximate cause of an injury to an employee, the company is liable in damages. *Lewis vs. Seifert*, 116 Pa., 628. 2. It is negligence in a train despatcher to give an indefinite order, such as to start a train in a few minutes. *Lewis vs. Seifert*, 116 Pa., 628.

XL. NEGLIGENCE OF ENGINEERS. 1. There is no duty on the part of a railroad company to instruct a skilled engineer in the dangers of a new locomotive he is set to operate, where it is of the same general character of the one to which he had been accustomed. The plaintiff, a locomotive engineer, was injured while leaning out of the cab window, by his head coming in contact with the support of a bridge, owing probably to the fact that the width of the cab on the engine was somewhat greater than the engine to which he was accustomed. Held, that he was not entitled to damages. *Bellows vs. R. R.*, 157

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Pa., 51. 2. In an action against a railroad company to recover damages for the death of an employee resulting from an accident due to the alleged negligence of the company, evidence, on the part of the plaintiff, of declarations as to defects in the engine made by officers of the company after the accident, and not in contradiction of prior testimony of such officers, are not admissible. *Erie & Wyoming Valley R. R. vs. Smith*, 125 Pa., 259. 3. A conductor of private freight cars attached to a train, at the request of a railway conductor, detached certain cars. In so doing, he fell off the train and was injured. If the injury was caused by the negligence or misconduct of the engineer of the train in suddenly and unnecessarily increasing the motion of the cars, held, the plaintiff was entitled to recover damages. *Cumberland Valley R. R. vs. Myers*, 55 Pa., 288. 4. The engineer of a locomotive, through whose negligence a collision is about to occur, may, perhaps, in any criminal aspect of the case, be justified in leaping from the engine to save himself from death, but may be held responsible or his employer for an injury which resulted from his primary act of negligence, and was rendered possible by his leaping from the engine. *Bunting vs. Horsett*, 139 Pa., 362. 5. In an indictment for criminal negligence of a railroad employee, under the act of March 22, 1865, if the defendant's negligence, concurring with the negligence of another employee of the company, contributed to the accident, he is as guilty as if his own negligence had solely caused the collision. *Comm. vs. Cook*, 8 Pa. County, 486. 6. In an action by a locomotive engineer against a railroad company to recover damages caused by the derailment of his engine, he was properly nonsuited, unless he proved that the accident was chargeable to the company's negligence. *Burrell vs. Gowen*, 134 Pa., 527. 7. Under the act of March 22, 1869, any refusal or neglect by an employee of a railroad company to obey its rules is punishable. For an engineer to sleep at his post when on a siding or otherwise is negligence. *Comm. vs. Griffin*, 7 Phila., 679. 8. Where an engineer knows a switch

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is not attended to properly, or is defectively constructed, and does not complain to the company, he cannot recover for injuries sustained in an accident, caused by the switch being misplaced. *Orrison vs. Penna. Co.*, 1 *Walker*, 134. 9. If the act of an engineer or other servant was wilful in running into a vehicle, the corporation employing him would not be liable; but if the damage resulted from the negligence or carelessness of the employee, an action upon the case will lie against the company employing such an unskillful or negligent servant. *R. R. Co. vs. Wilt*, 4 *Wh.*, 147.

XLI. NEGLIGENCE OF BRAKEMAN. 1. If a railroad company sends a brakeman, unfamiliar with the risk, over a portion of the road, dangerous because of low bridges, on a dark night, and without warning, it is liable for resulting injuries. *Davis vs. R. R.*, 5 Pa. County, 567. 2. Where a brakeman on a railroad was engaged one dark night in uncoupling trains, it became his duty to remain on the steps of an engine tank while the engine backed to the car. He jumped from this position without any apparent reason therefor, and started to cross the track. The engine backed on him and passed over his body. In an action by his widow and children against the railroad company to recover damages for his death, alleged to have occurred while endeavoring to climb upon the tank by reason of the failure of the company to provide proper steps, held, that there was no evidence of negligence. *Phila. & Reading R. R. vs. Schertle*, 97 Pa., 450. 3. An employee of a railroad company, while engaged in his ordinary occupation of coupling cars, had his head crushed between the ends of bridge irons projecting from the cars. The regulations of the company required its servants in coupling to stoop below the body of the car. This employee knew of the regulation, and had been specially warned to observe it. Had he done so, the accident would not have happened. Held, that the deceased was guilty of the lack of ordinary care. *Northern Central R. R. vs. Husson*, 101 Pa., 1. 4. Where a brakeman carelessly passed over the top of freight cars for some

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unknown purpose, and while the train was passing under a bridge with which he was familiar, he was knocked off and killed by the platform of the bridge, his family is not entitled to damages from the company for his death. It is not responsible for those dangers to which the servant voluntarily subjected himself, even though he did so without carelessness or breach of duty. *Pittsburg R. R. vs. Sentmeyer*, 92 Pa., 276. 5. A brakeman is not guilty of contributory negligence in side-tracking a car by a flying switch, where the exigency of the case requires it, although ordinarily a much safer method could have been adopted. *Dooner vs. Canal Co.*, 164 Pa., 17. 6. If the risk is an ordinary one, the employer is not liable, even if the employee did use ordinary care. In the present case, the employee, while coupling cars, was crushed by projecting ends of the material loaded on the cars. *Northern Central R. R. vs. Husson*, 3 York Record, 137. 7. A railroad company is bound to keep its tracks in proper repair for the conduct of the business of the road, and if it fail to do it, and injury is thereby caused to its employees in the performance of their work, the company may be held responsible for negligence. The mere fact that a defect exists, is not sufficient to entitle an employee who has been injured to recover damages. It must be such a defect as the duty of the company toward the person injured required it to repair or prevent. In the present case, a brakeman fell on a small pile of ashes lying between the tracks, resulting in the cars passing over him. Negligence of the company was not proven. *Costello vs. R. R.*, 32 W. N., 134. 8. Where a railroad company negligently places an obstruction over its roadway, dangerous to the lives of its employees, it fails in its duty to them, and therefore if a person enters the service of the company in ignorance of such danger, and remains so until injured or killed by it, the company is liable for damages. But if the employee had knowledge of the nature and degree of the peril, and continued in the service without protest and promise of amendment, the case is different. The position of a brakeman is

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extra hazardous, where at times he is compelled to ride on the top of freight cars which run under low bridges which overhang the track; but he assumes the dangers incident to the service. *Brossman vs. R. R.*, 113 Pa., 499.

XLII. NEGLIGENCE IN AWARDING DAMAGES FOR PERSONAL INJURIES. 1. The proper measure of damages is the pecuniary loss sustained by the parties entitled to the sum to be recovered without any *solatium* for distress of mind. Where children sue for damages for the loss of a father through the alleged negligence of the employees of a railroad, the loss is what the deceased would have probably earned by his labor in his business during the residue of his life, and which would have gone to the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure. *Penna. R. R. vs. Butler*, 57 Pa., 335. *Penna. R. R. vs. Books, Idem*, 339. 2. In actions for personal injuries, damages may be assessed beyond those that are merely compensatory. Such compensation is denied to those who sue for injuries to relative rights. In an action for damages to a passenger as the result of a collision on the railroad, the plaintiff is entitled to compensation for pain. *Penna. R. R. vs. Allen*, 53 Pa., 276. 3. In an action for the negligence of a railroad company which resulted in the death of a passenger, it is not necessary to the recovery that the widow, mother or next of kin, plaintiffs, shall have had a legal claim on the deceased for support. There must, however, be reasonable grounds to expect pecuniary advantage from the continuance of the relation, and that the plaintiff did actually sustain pecuniary damage or loss. Life, by law, has a value for the loss of which the survivors have a right to be compensated. The evidence need not show the precise amount of the damages in dollars and cents. The sound sense of the jury must ascertain the pecuniary value from the evidence in the case as best they may. *Penna. R. R. vs. Keller*, 67 Pa., 300. 4. The words "parents" and "children" in the act of April 26, 1855, relating to actions for personal injuries by negligence,

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are used to indicate the family relation as the foundation of the right of action without regard to age. The rule is, that if there be a reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning his death will sustain the action. *Penna. R. R. Co. vs. Adams*, 55 Pa., 499. 5. In an action on the case by a widow against a railroad company for an act of a conductor, which resulted in causing the death of her husband, the sum to be recovered under the act of April 26, 1855, is the pecuniary loss which the widow suffered from the death of her husband; nothing can be recovered for her wounded feelings, or by way of vindictive damages. *Penna. R. R. Co. vs. Vandever*, 36 Pa., 298. 6. In a suit brought by a widow against a railroad for the loss of her husband through the negligence of the employees of the company, the jury, in awarding damages, should place a value on the life of the deceased, and estimate his probable accumulations, and should consider his age, family and usual wages. The obligations of the widow to support herself and children are pecuniary injuries to her to be redressed. *Penna. R. R. vs. Henderson*, 51 Pa., 315. *Catawissa R. R. vs. Armstrong*, 52 Pa., 282. 7. In an action by a husband for the death of his wife by negligence, damages are not given for the suffering of the deceased nor for the wounded feelings of the plaintiff, but as a just compensation for the value of the companionship and services lost to the husband by reason of the premature death of his wife. *Penna. R. R. vs. Goodman*, 62 Pa., 329. 8. For the damages occasioned by the negligent running of the locomotives on a railroad, the company is liable in an action to the party injured, when the damages accrue. *R. R. vs. Lasarus*, 28 Pa., 203. 9. In actions against railroad companies for damages for personal injuries, there is a tendency on the part of juries to find verdicts for plaintiffs who are not entitled to anything, and to give exaggerated amounts even in meritorious cases; hence any expression of the court that the case before the jury is not subject to the strict control of legal principles, is undesirable,

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and may be erroneous. *McCloskey vs. R. R.*, 156 Pa., 254.

10. The limitation of railroad companies for the amount to be recovered against them for damages for negligence under the act of April 4, 1868, to \$3000 in case of personal injuries, and \$5000 in case of death, was revoked and avoided by the provisions of the new constitution. *Penna. R. R. vs. Bowers*, 129 Pa., 189. *Conway vs. R. R.*, 17 Phila., 71. *Fleming vs. R. R.*, 21 W. N., 526. *Matthews vs. R. R.*, 20 W. N., 575.

XLIII. NEGLECT BY EXECUTING RELEASE OF DAMAGES FOR PERSONAL INJURIES. 1. Where a party, with full knowledge of facts, in consideration of a railroad company paying the funeral expenses of his minor son who was killed while walking on the track, signs a release under seal of all claims for damages, it is error for the court to submit a question of fraud to the jury upon slight parol evidence to overturn such written instrument. The evidence of fraud must be clear, precise and indubitable ; otherwise it should be withdrawn from the jury. *Penna. R. R. vs. Shay*, 82 Pa., 198. 2. In an action against a railroad company to recover damages for personal injuries, defendant exhibited a release executed by plaintiff, who thereupon alleged that he was under the influence of anæsthetics when he executed it and hence mentally incapacitated. The case was properly left to the jury. He did not offer to return the money, and his conduct constituted an affirmance of the release. *Gibson vs. R. R.*, 164 Pa., 142. 3. A contract made in New York, by which, in consideration of the transportation of a circus train over a railroad, the owner agrees to release the railroad company from liability for negligence, being valid in New York, will be enforced in this state. *Forepaugh vs. R. R.*, 128 Pa., 217. 4. Where an employee of a railroad company has become a member of a relief association, and has agreed that the acceptance of benefits from the relief fund for injury or death shall operate as a release against the railroad company, which has assumed to pay the expenses of the relief association, the consideration to support the release is sufficient. *Ringle vs. R. R.*, 164 Pa., 529. *Johnson vs. R. R.*, 2 Pa. Dist., 229.

Railroads—Continued.**XLIV. NEGLIGENCE OF JURISDICTION OF ACTION AT LAW.**

1. An action may be maintained in this state against a railroad company, process being served here, to recover damages in an action *ex delicto*, for negligence, causing death in another state, where a statute of such state is similar to the Pennsylvania statute authorizing such action. *Knight vs. R. R.*, 108 Pa., 250. 2. If a passenger be injured by a negligent collision of the trains of two railroad companies, he may maintain an action against both. *Klauder vs. McGrath*, 35 Pa., 128.

XLV. NEGLIGENCE TO PROTECT FROM FRIGHT. Owing to a collision of cars, the end of a car was projected with violence against the rear of a neighboring dwelling-house, causing great fright, nervous excitement and distress to its occupant, and mental and physical pain, although no bodily injury resulted to her. But mere fright, unaccompanied by bodily injury, is not a cause of action, otherwise the scope of what are known as accident cases would be greatly enlarged. Negligence constitutes no cause of action, unless it establishes or expresses some breach of duty. The railroad company owed the plaintiff a duty not to injure her person by force or violence, but it owed her no duty to protect her from fright. In no case has it ever been held, that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action. *Ewing vs. R. R.*, 147 Pa., 43.

XLVI. NEGLIGENCE IN THE DELIVERY OF FREIGHT. 1. No previous contract of immunity will protect a carrier from the results of his own negligence. This cannot be provided against. *Colton vs. Cleveland R. R.*, 67 Pa., 211. 2. A contract by a railroad company, limiting their liability as carriers, does not relieve them from ordinary care in the performance of their duty. The most it can do is to relieve them from the conclusive presumptions of negligence, which arise when an accident happens which is not inevitable even by the highest care, and to require that negligence be actually proved against them. *Goldey vs. Penna. R. R.*, 30 Pa., 242. 3. A common carrier may by a special contract, and perhaps by notice, limit

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his liability as to every cause of injury, excepting that arising from his own or his servant's negligence. A bill of lading limiting the responsibility of a railroad company in the transportation of goods, accepted by the shippers, puts the burden of proof upon them in the event of the goods being destroyed by fire while still in the custody of the company. *Farnham vs. Camden & Amboy R. R.*, 55 Pa., 53. 4. Limitations in the contract between the original carrier and a shipper as to the exemption of liability of such carrier for loss of oil from fire or leakage while in transit, will not benefit a subsequent carrier to whom the goods are transferred for delivery at their destination. *Camden & Amboy R. R. vs. Forsyth*, 61 Pa., 81. 5. A railroad company having receipted for merchandise "to forward" to a point beyond its line, is not responsible for injury thereto by a subsequent carrier. *Mullarkey vs. R. R.*, 9 Phila., 114. 6. Where a railroad company undertakes to carry a package entrusted to it beyond the terminus of its own line, the company becomes responsible thereby for its safe delivery at its destination. *Phila. & Reading R. R. vs. Ramsey*, 1 Schuylkill Record, 3. 7. A carrier may bind himself to transport goods beyond his own route, and thus become responsible for the default of those he employs to carry the remainder of the distance; but the proof of the contract should be clear. *Penna. R. R. vs. Berry*, 68 Pa., 272. 8. If delivery of goods be made by a common carrier to a person other than the consignee, though innocently and by mistake, but without the order of the consignor, the carrier is liable to the consignor for their value, in case of loss thereby. *Wernwag vs. R. R.*, 117 Pa., 46. 9. Where a box improperly directed was delivered to a railroad company for transportation, and was safely carried to its destination, and there was delivered by reason of the improper direction to the wrong person, the company was not liable for the loss. *Lake Shore R. R. vs. Hodapp*, 83 Pa., 22. 10. Where a railroad without notice to the consignee unloaded goods at a private platform, and not at the station where delivery was to be made, it will

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be held liable for the loss of the goods. *Penna. R. R. vs. Mitchell*, 24 **Pittsburg Journal**, 72. 11. There was a custom that a railroad company should deliver freight on the platform of minor stations, whose business would not justify a warehouse, to be received there by the consignee on discharge from the car. Held, that a custom will control the general law of the liability of carriers, and the delivery of the freight on such platform by the company being proved, no liability existed if the consignee failed to find it there. *McMasters vs. Penna. R. R.*, 69 **Pa.**, 374. 12. In the ordinary railway transportation by common carriers of goods, there is no obligation after they reach their destination, but to put them safely in warehouses. Express companies are ordinarily held to personal delivery, either to the residence or place of business. *American Express Co. vs. Robinson*, 72 **Pa.**, 274. 20 **Pittsburg Journal**, 68. 13. Negligence is the absence of care according to the circumstances, and where the circumstances are unusual or an accident occurs which could not reasonably have been anticipated, as in the case of a fire burning in the woods near a railroad station, common carriers are not bound to make provision therefor, and are not responsible for a loss thereby. *Penna. R. R. vs. Fries*, 87 **Pa.**, 234. 14. Loss by fire, though it proceeded from no negligence on the part of the railroad company, would not be a defence for them as common carriers. In this character, they became insurers of the property entrusted to them, and were bound to deliver it in all events, the acts of God and the public enemy alone excepted. *McCarty vs. N. Y. & Erie R. R.*, 30 **Pa.**, 251. 15. Where goods have been left on the platform of a railroad depot, the company is liable as a common carrier for their loss by fire; but where they have been taken into the depot to await the owner's convenience in removing them, the company is liable only on proof of its negligence. *Penna. & N. Y. Canal & R. R. Co. vs. Waltman*, 1 **Walker**, 139. 16. An extraordinary flood compelled the crew of defendant's train, on which goods were shipped, to desert their posts

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for safety. No effort was made to protect the property, and the cars were looted by a mob. Held, that the plaintiff was entitled to recover from the company the value of his goods, although had the flood been the proximate cause of the loss, it would have relieved against defendant's liability. *Lang vs. R. R.*, 2 Pa. Dist., 125. 17. When any merchandise is on the same train with cars loaded with combustible substance, easily ignited by sparks, it is the special duty of the carrier to take every available precaution against the spreading of fire, should it occur. A simple measure is to have the coupling of the cars in such order that any car can be easily detached from the others. *Empire Transportation Co. vs. Wamsutta Oil Co.*, 63 Pa., 14. 18. Where a bill of lading exempted the carrier from loss or damage on any article by fire or other casualty, while in transit or in depots, and the property was destroyed by a mob near the defendant's depot, held, in the absence of proof of negligence on the part of defendant, the plaintiff was not entitled to recover. *Hall vs. R. R.*, 27 Pittsburgh Journal, 117. 19. The Pullman Car Co. is not a common carrier, and cannot be held responsible for the safekeeping of articles of great value. *Pfaelzer vs. Pullman Car Co.*, 4 W. N., 240. 20. Where a railroad company delivered goods to the consignee, when it should have held them subject to the order of a party named in the bill of lading, held, that by such surrender of the goods the lien of the company was released, and it could not resume the possession of the property, nor maintain an action of replevin. Replevin cannot be maintained, without showing either a general or special property in the plaintiff, together with the right of immediate possession. *Lake Shore R. R. vs. Ellsey*, 85 Pa., 283. 21. A carriage was shipped on defendants' railroad. The bill of lading provided, that except the agents of the defendants were guilty of gross negligence, they were not to be responsible for any damages of railroad or of fire. The carriage reached its destination, injured by fire. Held, that as the defendants refused to account for the cause of the injury, a presumption

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of negligence arose, which they must rebut, and the jury must determine whether the defendants had been guilty of negligence. *Penna. R. R. vs. Miller*, 87 Pa., 395. 22. Railroad companies have no right to make any undue discrimination or preference in their charges. Yet a company may charge a lower rate of freight for coal transported to a manufacturing establishment from which it obtains manufactured products for transportation, than to a coal dealer, whose business with the company is limited to the coal transported. *Hoover vs. R. R.*, 156 Pa., 220.

XLVII. NEGLECT TO DELIVER BAGGAGE. 1. A passenger who has checked his baggage on a railroad and fails to receive it, is entitled to the necessary and unusual wearing apparel in the trunk or valise adapted to his station of life. Under the constitution, no limitation can be made by act of assembly on the amount to be recovered for injury to person or property. *Baker vs. R. R.*, 5 W. N., 293. 2. A clear and explicit notice to passengers, that baggage of a passenger is at the risk of the owner, and that baggage is confined to wearing apparel, which notice is brought home to the passenger, will release the carrier from responsibility, except for acts of gross negligence. Ordinary care, even in case of such special notice, is required, however. Notice given in English to a German, who has no knowledge of the contents of the notice, will not exonerate the railroad company from liability for money commingled with wearing apparel, in the passenger's trunk. *R. R. Co. vs. Buldauf*, 16 Pa., 67. 3. A common carrier may limit his liability by notice to passengers, that baggage is at their own risk. *Laing vs. Colder*, 8 Pa., 484. 4. Where the ticket sold by a railroad company to a point upon a connecting road contained a printed stipulation, that in selling, the company acted as agent only for roads beyond the terminus of their road, and assumed no responsibility therefor, the company is not liable to a passenger for the loss of baggage not occurring upon the line of their own road. *Pa. Central R. R. vs. Schwarzenberger*, 45 Pa., 208. 5. Where

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a party obtained a check for his trunk in Philadelphia for Atlantic City from a railroad company operating as a New Jersey corporation between these two places, and the trunk was lost by the company, held, that as the contract was to be performed in New Jersey by a New Jersey corporation, the Pennsylvania act of April 11, 1867, did not apply, and that the liability of the company was to be determined by the law of New Jersey. *Brown vs. Camden & Atlantic R. R.*, 83 Pa., 316. 6. Any regulation that deprives a passenger of the right to stop and receive his baggage at any regular station or stopping place of the train on which he may be traveling, is necessarily arbitrary, unreasonable and illegal. In the present case, the plaintiff's ticket would have carried him to the end of the line, but desiring to leave at a way station, he presented his check and demanded his baggage, but it was refused him until it reached the final place of destination. *Pittsburg & Cincinnati R. R. vs. Lyon*, 123 Pa., 140. 36 Pittsburg Journal, 286. 7. It is a complete defence to an action against a common carrier for loss of baggage, to show that the baggage was destroyed by a flood of such unprecedented character as to amount to an act of God. *Long vs. R. R.*, 147 Pa., 342.

XLVIII. NEGLIGENCE IN TRANSPORTING CATTLE. 1. If a railroad company, transporting live stock, permits straw to be used on the cars, and a fire originate therefrom, by which the animals are injured, it is such negligence as will render them liable for the loss sustained. A contract, exonerating the company from all claims for injury to the stock whilst in their cars, does not exonerate them from the consequences of negligence in the performance of their duties as common carriers. *Powell vs. Penna. R. R. Co.*, 32 Pa., 414. 2. Cattle require a speedy transportation to market; a carrier must display diligence in moving them. *Pittsburg & Connelville R. R. vs. McShane*, 25 Pittsburg Journal, 147.

XLIX. NEGLIGENCE OF LIABILITY BY THE LESSEE OF A RAILROAD. A lease made by one railway corporation to another, by

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legislative authority, exempts the lessor from liability for negligence in the operation of the road by the lessee, if no control is reserved to the lessor. *VonSteuben vs. R. R.*, 4 Northampton Co., 345.

L. NEGLECT OF CONTRACTORS. 1. A railroad company employed an independent contractor to haul freight cars by mule teams on a street. These cars so hauled were under the exclusive management of the servants of the contractor. A person having been crushed between two cars, owing to the negligence of the contractor's servants, suit was brought against the railroad company for damages. The company defended, on the ground that it was not liable for injuries occasioned by the negligence of the servants of an independent contractor. Held, that the company could not in this way escape its charter obligations, and that it was liable in damages to the plaintiff. *Phila. & Wilmington R. R. vs. Hahn*, 22 W. N., 32. 2. Where a railroad company contracts for the construction of its road with one who agrees to do all the work for a stipulated price, retaining to itself no direction or authority as to the means to be employed by the contractor to perform the work, the company is not liable for damages resulting from his negligence, for the contractor is exercising an independent employment. *Edmundson vs. R. R.*, 111 Pa., 316.

Railways. (STREET CARS.)

I. NEGLECT IN LOCATION AND CONSTRUCTION. 1. A railway cannot occupy a street with its track, even temporarily, unless such right is clearly conferred by its charter. The councils of a city cannot confer such right, but the legislature only. The unauthorized occupation of a street by a railway track is a nuisance *per se*, which equity will restrain, upon information of the attorney-general. *Atty.-General vs. Ry. Co.*, 10 Phila., 352. 2. Although the unauthorized occupation of a public street by railway tracks may be regarded as a nuisance *per se*, which will be enjoined, an injunction against it will not be granted at the suit of a private citizen, or a cor-

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poration, unless the plaintiff can make out a case of special damages. *Sparhawk vs. Ry. Co.*, 54 Pa., 401. *Larimer Ry. Co. vs. Ry. Co.*, 137 Pa., 533. 3. Where a railway track is on a public street, owners of property in the vicinity, to sustain a complaint for constructing and maintaining it, must establish that it is a public nuisance, and that they have sustained special damage. *Dilley vs. Ry. Co.*, 6 York Record, 89. 2 Pa. Dist., 91. *Potts vs. Ry. Co., Idem*, 200. *Collins vs. Ry. Co., Idem*, 417. 4. The unauthorized construction of a railway on a public street in a city is a nuisance, though a private one, and may be restrained by injunction at the suit of a private person, who may suffer an injury thereby. *Watkin vs. Ry. Co.*, 1 Pa. Dist., 463. 5. An injunction will be granted to enjoin the erection of an elevated railroad upon the street on the application of abutting property holders, where such erection is not authorized by law. *Potts vs. Elevated R. R.*, 11 Lancaster Review, 81. 6. It is settled in Pennsylvania, that a private citizen may prevent the construction of a street railway, provided he can show, first, special damage to himself, and second, that the railway company has no authority to construct the proposed road. *Shipley vs. Ry. Co.*, 13 Phila., 128. 7. A railway company was authorized to lay its tracks in the centre of a certain street, but upon an open space at an intersection of other streets there was a slight deflection of the track from the centre line, to enter upon the private property of the company. The company, being indicted for maintaining a nuisance in unlawfully obstructing the street with such track, upon showing that the position of the track did not interfere with public travel, the court held that its mere location was not a nuisance. *Comm. vs. Wilkesbarre Ry. Co.*, 127 Pa., 278. 8. A township in giving consent to occupy streets and roads cannot reduce the time limit fixed by the legislature, which allows street railways two years for the completion of their roads. A court of equity cannot direct the exclusive appropriation of any part of a public highway by an electric

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railway company. *Plymouth vs. Ry. Co.*, 15 Pa. County, 442. *Penna. R. R. vs. Ry. Co., Idem*, 454. 9. A special injunction against the illegal construction of an elevated railway along a public street will be limited to that portion of the highway immediately fronting the property of the complainant. Where the wrong is against the general public using the highway, redress can only be had at the suit of the public authorities. *Collins vs. Ry. Co.*, 32 W. N., 379. 10. The city of Philadelphia is a competent party to a bill to restrain an illegal use of a public highway by an attempt to lay a passenger railway thereon. Property holders alleging private injury on the line of such railway are also competent. *Philadelphia vs. Ry. Co.*, 8 Phila., 648. 11. An electric passenger railway is bound to use reasonable care and prudence in placing its wires and poles, and to adopt all ordinary appliances to prevent contact between its trolley and feed wires and the wires of a telephone company stretched along or across the same highway. *Central Telephone Company vs. Ry. Co.*, 1 Pa. Dist., 628. 12. On a bill filed by abutting owners against a street railway company, incorporated under the act of May 14, 1889, to enjoin the construction and operation of an electric railway on a city street, newly paved with asphalt at the expense of the owners, averring that said construction would impose an additional burden upon them, a preliminary injunction was refused. The use of poles and wires by electric railway companies is no greater interference with the ownership of an adjoining property owner on a street, than the use of streets for fire-plugs or lamp-posts. *Lockhart vs. Ry. Co.*, 139 Pa., 419. 13. When a passenger railway once locates its track, it has exhausted its franchises and cannot lay an additional track. *Worth vs. City Ry. Co.*, 2 W. N., 650. 14. A street railway company, chartered by a special act, which is silent as to the style of rail to be used for its track, is not confined thereby to the kind of rail in use when the charter was granted, but may change its form and substitute another kind, provide it create no greater obstruc-

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tion to the street nor increase the cost to the city of keeping the street in repair. *Easton Ry. Co. vs. Easton City*, 133 Pa., 505. 15. There is no mode provided by law to compel a passenger street railway company to give bond to secure consequential damages to the owners of property abutting on the street. *Dutton vs. Ry. Co.*, 1 Montgomery Co., 4.

II. NEGLECT IN PAVING STREETS. 1. The charters of many street railways require them to keep in repair the whole width of streets used and occupied by them. *Thirteenth St. Ry. Co. vs. Philadelphia*, 16 Phila., 164. 2. Where a city ordinance provides that railway companies shall pave the streets occupied by them, the fact that another company occupies the same street makes no difference. The city may elect to sue one company for all, and drive it to action against the other for contribution, or it may sue each for one-half. No company can be compelled to pay for paving a street not occupied by it. *Philadelphia vs. Second St. Ry. Co.*, 10 Lancaster Review, 364. 2 Pa. Dist., 705. 3. Where two street railway companies are, by contract with the city, each liable for the same paving, suit may be brought by the city against either for the entire cost, leaving the company sued to obtain contribution from the other; or it may sue each for one-half in *assumpsit*. In justice to the companies, for even passenger railway companies are entitled to justice, suit should be brought by the city against each company for its proportion of the cost of paving. The question frequently arises where intersections are paved. *Philadelphia vs. Ry. Co.*, 33 W. N., 522. 4. Where a railway company gave bonds to councils agreeing to keep the streets on its route in repair, and subsequently failed to do so, necessitating the work to be done by the city, held, that the company was liable to the city for the cost of repaving. *Frankford Ry. Co. vs. Philadelphia*, 17 W. N., 245. 5. Where an act of assembly or ordinance impose upon a railway company the duty of keeping in repair the entire roadway of the streets occupied by it, the court will see to it that the act or ordinance is enforced. *Thirteenth St. Ry. Co. vs. City*, 13

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W. N., 487. 6. Ordinances of the city of Philadelphia have provided, that all street railway companies should be at the entire expense of maintaining, paving, repairing and repaving that may be necessary upon any road, street, avenue or alley occupied by them. This applies to the entire roadway from curb to curb. The necessity for this work is to be determined not by the company itself, but by the municipal authorities, who are to determine the material and how the work is to be done. *Philadelphia vs. Ry. Co.*, 143 Pa., 444. 7. The Philadelphia ordinance of July 7, 1857, provides, that it shall be the duty of any street railway company to pave or repave the highways occupied by its tracks, and should it refuse or neglect to do so for ten days from the date of notice, councils may forbid the running of cars upon such railway until the same is fully complied with. *Philadelphia vs. Ry. Co.*, 169 Pa., 270. 8. Where the charter of a passenger railway company provided that they should keep so much of the streets from curb to curb as may be used by them, in perpetual good repair, at the expense of the corporation, held, that the company were bound to remove the *debris* washed into the street from a neighboring hill as the result of an extraordinary rain. *Pittsburg Ry. Co. vs. Pittsburg*, 80 Pa., 72. 9. In July, 1857, the councils of Philadelphia provided an ordinance, which is still in force, that passenger railway companies shall be at the entire cost and expense of maintaining, paving, repairing and repaving that may be necessary upon any road, street or alley occupied by them. Since then, charters have been granted to twenty-seven passenger railway companies, each containing a provision that the company shall repair the streets, or, what is equivalent, that they should be subject to the city ordinances. *Ridge Ave. Ry. Co. vs. Philadelphia*, 124 Pa., 223. 10. Where a borough ordinance provides, that a railway company shall reconstruct a street upon which its tracks are to be laid, and to keep it in good order, such corporation is not obliged in the future to put down a new and improved pavement on demand of the borough authorities. *Norristown vs.*

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Ry. Co., 148 Pa., 87. 11. Where the legislature has imposed upon a street railway company the obligation of paying for the original paving of a street, an abutting landlord can set up such legislative action as a defence to a suit brought by the city against himself to recover the cost of such paving. *Philadelphia vs. Bowman*, 166 Pa., 393. 12. Where the duty of paving city streets is incumbent upon a street railway company by virtue of its charter and ordinances of councils, and the duty is persistently neglected after repeated notices, the city may do the paving and collect the cost from the company. *Philadelphia vs. Ry. Co.*, 15 Pa. County, 29. 3 Pa. Dist., 468. 13. Where by its charter a railway company is obliged to keep the streets on its line in good repair, and fails to do so, the commissioner of highways will not be enjoined from stopping the running of the cars while the city is doing the work. *Gray's Ferry Ry. Co. vs. Philadelphia*, 11 Phila., 368. 2 W. N., 639. 14. A city has authority to regulate, by reasonable ordinance, the manner in which a passenger railway company shall lay its tracks on the public street. *Harrisburg Ry. Co. vs. Harrisburg*, 7 Pa. County, 584.

III. NEGLECT TO REPAIR ROAD-BED. 1. Though a defect in the road-bed of a passenger railway was not caused by any act of the company, yet if they knew of its existence, and that the street was made dangerous thereby, it was their duty to have it repaired; otherwise they would be liable for negligence. *Oakland Ry. Co. vs. Fielding*, 48 Pa., 320. 2. It is the duty of a railway company to keep its tracks in proper repair, so as to do no injury to the public. This is a condition attendant upon the grant of the franchise, and if neglected, the company is liable in damages for injury sustained by any one thereby. *Broadwell vs. Ry. Co.*, 153 Pa., 106. 3. Where iron plates exist in a street, used as man-holes or for other purposes, it is the duty of a railway company agreeing to keep the street in repair, to see that they are securely fastened, so that they will not tilt nor yield to pressure. *Mayberry vs. Ry. Co.*, 9 W. N., 404. 4. A natural gas company, which

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is compelled to pay damages for personal injuries caused by the leakage of gas from a defective pipe, may recover from a street railway company whose negligent excavation in the street caused the pipe to break. *Philadelphia County vs. Traction Co.*, 165 Pa., 456. 5. While it is the duty of a railway company to keep the paving under its track in repair, it is not negligence on its part to remove a depression maintained under its track by direction of the city, as a means of draining the street. A party injured by falling at night into this depression has no remedy against the company. *Campbell vs. Ry. Co.*, 139 Pa., 522. 6. A street railway company is bound to know that use and climatic influences will produce defects in rails, and it is bound to make such a continued inspection as will detect those which are apparent. *Gilton vs. Ry. Co.*, 166 Pa., 460. 7. The city of Philadelphia and the passenger railways are both liable in damages for neglect to repair the streets over which the railway tracks are laid. *Philadelphia vs. Weller*, 4 Brewster, 24 Leg. Gaz. Report, 400. 8. Where a street railway company is compelled to keep a street repaired, it is liable in damages for personal injury to a pedestrian who at night in attempting to cross the railway track fell into a hole among loose cobblestones and was run over by the car. *Kraut vs. Ry. Co.*, 160 Pa., 327. 9. Where the streets or roads occupied by a railway company are in a dangerous condition, it is the duty of the company to give adequate warning to the public. *Wagner vs. Ry. Co.*, 158 Pa., 419. 10. It is the right of a street car company, bound by its charter to keep in repair the streets occupied by it, to show that a defect in a street, causing an injury, was the result of the negligence of persons other than themselves, and if this fact be shown, the jury should be charged to find for the defendant. *Citizens' Ry. Co. vs. Ketcham*, 122 Pa., 228. 11. Where an act of incorporation imposes upon a railway company the obligation of keeping a highway in repair, this not only creates a contract with the state, but imposes a duty to the public, and an action may be maintained against said company by any private person who

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has been injured by the company's neglect of said duty. *Mullen vs. Traction Co.*, 20 W. N., 203. 12. A railway company is liable for injuries resulting from a failure to keep the highways it occupies in good repair. *Mayberry vs. Ry. Co.*, 15 Phila., 253. 13. A preliminary injunction to restrain a passenger railway company from salting its tracks will not be granted, until a trial at law establishes that the salting is a public nuisance. *Easton vs. Ry. Co.*, 2 Pa. County, 639. 14. It seems, that it is negligence for a street car company to take up old rails from their track, pile them in the gutter on the street, and leave them there for several weeks. In the present case, one of the rails became displaced, resulting in the plaintiff tripping over it and falling. *Souths de Ry. Co. vs. Cox*, 2 **Monaghan**, 140.

IV. NEGLECT TO USE FRANCHISES. 1. A grant in the charter of a passenger railway company of an optional circuit over another road, not having been exercised for eleven years, is proof of abandonment of the franchise. *Girard College Ry. Co. vs. Ry. Co.*, 7 Phila., 620. 2. Where a railway company possessed the right under its charter to lay a double track, and did so, and used the same, but subsequently removed one of the tracks, the remaining one answering for ten years, at the expiration of which time, on their endeavor to relay the double track, a bill was filed to restrain them on the ground of non-user, held, that there was no ground of forfeiture. *Hestonville Ry. Co. vs. Philadelphia*, 89 Pa., 210.

V. NEGLECT TO RETAIN POSSESSION OF ROAD. 1. A passenger railway company has no power to lease its road and franchises, unless expressly authorized by its charter. *Rafferty vs. Traction Co.*, 39 Pittsburg Journal, 15. 2. Street railway companies have power in this state to make leases of their franchises, to traction, cable or electrical passenger railway companies. *Smith vs. Ry. Co.*, 2 Pa. Dist., 496.

VI. NEGLECT BY RUNNING CARS ON SUNDAY. Running passenger cars on Sunday is a violation of the act of 1794, and is within its penalties, but a private party cannot employ

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civil process to punish wrongs to the public. *Sparhawk vs. Union Railway*, 54 Pa., 401.

VII. NEGLECT TO RUN CARS. An insurance company insured a street railway company from liability for damages resulting from accidents caused by the horses, cars, plants, ways, works, machinery or appliances used. The car company was obliged to pay damages for personal injuries to a passenger sustained by the upsetting of a large omnibus sleigh, which was used in place of a car while the tracks were obstructed by snow and ice. Held, that the insurance company was not liable for the loss. *Phillipsburg Car Co. vs. Fidelity Co.*, 160 Pa., 350.

VIII. NEGLECT TO ABATE SPEED. 1. Where an ordinance prohibited trains running through the city beyond a stated rate of speed, a non-compliance with such ordinance will render the company liable for injury resulting from its negligence. *Railroad Co. vs. James*, 1 W. N., 68. *Mulhair vs. Ry. Co.*, 5 W. N., 190. 2. A street railway company is guilty of gross negligence in running its electric cars at a high rate of speed between obstructions, in this case piles of dirt, which it had placed on either side of its track. Great care should be taken in running the cars at such a place. *Greeley vs. Ry. Co.*, 153 Pa., 218. 3. It is proper to submit the case to a jury, where it is shown that an electric street car approached a street crossing at a high rate of speed, striking a team of spirited horses hitched to a long and heavy market wagon. *Downey vs. Traction Co.*, 161 Pa., 131. 4. Railway cars have a right to go fast, and the mere fact that a traveler's horse takes fright at an approaching car confers no right of action whatever against the street railway company. Its right to run its cars over its tracks laid upon a public highway is equal to the right of travelers to the use of the highway. To create liability against the company, the evidence should clearly show that the car was moving at an unusual rate of speed; at a rate not allowed by the municipal ordinance. *Yingst vs. Ry. Co.*, 167 Pa., 438. 5. An electric

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car should not be permitted to run at a reckless rate of speed on a crowded thoroughfare of a city. If the defendant company had exclusive right to the street it would present a different question, but so long as an user of the street in common with the public exists, it is the duty of street railway companies to exercise watchful care to prevent accidents. *Haney vs. Traction Co.*, 159 Pa., 398. *Jackson vs. Traction Co.*, *Idem*, 399.

IX. NEGLIGENCE RESULTING IN COLLISIONS. 1. If a person suffers injury from the joint negligence of a railroad company and a street railway corporation causing a collision, he may join both companies in one action for damages for injuries received, and a verdict may be rendered against both. *Downey vs. Traction Co.*, 14 Pa. County, 251. 2. While separate suits may be brought against several defendants for a joint trespass, yet whenever the plaintiff has actually received from one of them satisfaction for the injury he sustained, the cause of action is discharged against all. Where the plaintiff, a passenger, was injured in a street car collision, and for money paid released the carrier company from all liability for the injury, he thereby discharged the other company also. This is true, even if the negligence of the second company alone occasioned the accident, and although the right of action against it was expressly reserved. *Seither vs. Traction Co.*, 125 Pa., 397. 24 W. N., 246. 3. A common carrier of passengers is bound to take every means to avoid danger which reasonable foresight or prudence could suggest. When a passenger in a street car is injured by a collision with an engine at a railroad crossing, a *prima facie* presumption of negligence on the part of the street car company arises. Where there is a defect in the condition of a street car, in consequence of which a passenger is injured, the company is liable. *People's Ry. Co. vs. Weiller*, 17 W. N., 306. 4. Where both parties are mutually in fault, owing to a mistake of fact, no action lies. In the present case, the driver of a dray stopped at what he thought was a safe distance from a street railway track, but he was mistaken,

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as was also the driver of the car, for the car struck the dray. There was either no negligence or there was joint negligence.

Patton vs. Traction Co., 23 W. N., 542. 132 Pa., 76.

5. Where a train of cars on a steam railroad collides with a street car at a grade crossing, and a passenger on the street car is injured, both companies are answerable to the passenger if they both were negligent, and the passenger may maintain his suit against either. A passenger in a street car approaching a grade crossing of a railroad is under no obligation to look and listen for approaching locomotives, or to jump off the car in view of a possible collision. *O'Toole vs. R. R.*, 158 Pa., 99.

X. NEGLECT IN CROSSING TRACKS. 1. The case should be submitted to a jury, where the driver of a wagon stopped near a public crossing of a traction road, and being signaled by the company's watchman to cross the track, attempted to do so, and was struck by an electric car and injured. The car was moving very rapidly. *Haney vs. Traction Co.*, 159 Pa., 395. 2. A person about to cross the tracks of a street railway operated by cable or electricity, is bound to look and listen. While there is no settled rule that he should stop before crossing, yet there may be occasions when it will also be his duty to stop. *Omslaer vs. Traction Co.*, 168 Pa., 519. 3. In the present case, the passenger on a cable car got out on the north side, and without waiting for the car to move on, he turned sharply around the rear of the car and started to cross the street. There was room between the tracks for him to stand in safety. Instead of looking, he stepped upon the south track, and was struck and injured by another car. He was properly nonsuited for contributory negligence. *Buzby vs. Traction Co.*, 126 Pa., 559. 4. An electric railway has the right to cross the tracks of a steam railroad at grade, but must adopt such regulations as will protect the public. *Penna. R. R. vs. Transit Co.*, 11 Pa. County, 591. 5. In a suit against a railway company for damages resulting from a collision with a carriage, the plaintiff was held guilty of con-

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tributory negligence in attempting to cross the track in front of a moving street car. *Thomas vs. Ry. Co.*, 132 Pa., 504. 6 **Montgomery Co.**, 461. 6. A carriage, while being driven across the track of a street railway, was struck by the pole of the car and injured. Held, that the question of the alleged negligence of the respective drivers of the carriage and car was one of fact for the jury. *Girard College Ry. Co. vs. Middleton*, 3 W. N., 486. 7. Where plaintiff's case fails to show that the person injured was a passenger on the defendant's car, and fails to show any negligence by the defendant, a nonsuit will be entered. *Dougherty vs. Frankford Ry. Co.*, 5 W. N., 14. *Boyd vs. R. R.*, 2 W. N., 198. 8. It is the duty of a traveler about to drive across a street railway, to stop, look and listen at the edge of the track, and his neglect to do so is negligence *per se*. While street railways have not an exclusive right to their tracks, their rights are superior to those of the traveling public. Their cars have the right of way. *Ehrisman vs. Ry. Co.*, 150 Pa., 180. *Wheelahan vs. Traction Co.*, *Idem*, 187. 9. It seems that a person is not bound to stop before crossing a street railway track, but he must look and listen. The driver of a wagon who approaches a street railway crossing, drives upon the track without looking, and comes into collision with a car, is guilty of contributory negligence, and the owner of the wagon cannot recover damages against the company. The street railway has become a necessity in all great cities. Greater and better facilities and a higher rate of speed are demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a higher measure of care necessary, both on the part of the street railways and those using the streets in the ordinary manner. The companies should give notice of the approach of their cars to the crossings. *Carson vs. Ry. Co.*, 147 Pa., 219. 10. It is the duty of a person on foot or horseback, or with a carriage under his control, moving on the track of a city railway, to keep a look-out for a car entitled to pass in an opposite direction on the same railway, and to

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turn off the track soon enough to allow the car to pass without impediment. *Jatho vs. Ry. Co.*, 4 Phila., 24.

XI. NEGLIGENCE BY OBSTRUCTING THE TRACKS. 1. A penalty may be enforced against any person who obstructs or impedes the passage of the cars of a railway company. Cars traveling on the tracks cannot turn out to pass other vehicles, but such vehicles must turn out for the cars to pass. A driver, in unloading his wagon, should not place it across railway tracks, but alongside of them. *Comm. vs. Donaldson*, 32 Pittsburgh Journal, 25. 2. The substitution of the electric car for the horse car renders impracticable and dangerous certain uses of the streets which were once permissible and comparatively safe, and persons crossing or driving upon such streets must conform to the changed condition. A driver who, in unloading, places his horses squarely across the track of a railway on a dark night at a point where there is a descending grade, is guilty of contributory negligence and cannot recover for injury to his horses by a passing car. *Winter vs. Ry. Co.*, 153 Pa., 26. *Gilmore vs. Ry. Co., Idem*, 31. 3. A street railway company has the absolute right to the free and unobstructed use of its tracks while running its cars. The driver of a vehicle upon the track of a street railway must be on his guard and get off the track when a car approaches; a failure to do so amounts to contributory negligence. *Quinby vs. Ry. Co.*, 2 Delaware Co., 285. 4. Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the sole use of their own tracks. The public has a right to use those tracks in common with the railway companies, although the rights of the latter to them may be superior to the rights of the former. Hence, it is the duty of passenger railway companies to exercise watchful care to prevent accidents or injuries to persons who, at the moment, may be unable to get out of the way of a passing car. *Gibbons vs. Wilkesbarre Ry. Co.*, 155 Pa., 279. 5. While street railways have not an exclusive right to their tracks, their rights are superior to those of the traveling public.

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Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. On the other hand, it is the duty of the companies to see that their motormen shall be on the alert, not only at the crossings, but everywhere upon the tracks, to see that citizens are not run down and injured. *Ehrisman vs. Ry. Co.*, 150 Pa., 180.

XII. NEGLIGENCE IN FRIGHTENING HORSES. 1. Street car companies, having as much right to run cars on the streets of the city as other citizens to drive their horses through them, are not responsible for horses taking fright at the movements of their cars. *Hazel vs. Ry. Co.*, 132 Pa., 96. 2. It is not negligence in the driver of a car to ring the bell of the car as he passes a team; it is negligence not to do so, and if by such ringing a horse was frightened and ran in front of the car and was injured, there was not such negligence on the part of the car driver as to submit the case to a jury. *Phila. Traction Co. vs. Bernheimer*, 125 Pa., 615. *Steiner vs. Traction Co.*, 134 Pa., 199.

XIII. NEGLIGENCE OF PEDESTRIANS AND WORKMEN IN STREETS. 1. He who voluntarily places himself in a position of known danger, is negligent, and cannot recover damages if injured. Where a workman attempts to work between the tracks of a street railway and a pile of building materials close to the track, he is guilty of contributory negligence. *Ferguson vs. Traction Co.*, 20 Phila., 249. 9 Pa. County, 147. 2. The plaintiff, an employee of a city, was engaged in laying a water-pipe under defendant's track. In lifting the pipe into the trench, plaintiff was compelled to stand over the rail in the car track with his back towards approaching cars. The cars were drawn over the ditch by horses attached to a rope and driven outside the tracks. In the present case no warning was given, and the workman was struck and injured by the car. The question of negligence and of contributory negligence was properly left to the jury. *Owens vs. Ry. Co.*, 155 Pa., 334. 3. A street railway and a pedestrian, having each the right of

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way upon a public highway, each is bound to be on the lookout for the other; but, as the railway is necessarily confined to its track, the right thereon of the person on foot is subordinate to that of the railway company. The plaintiff, on the other hand, could use the whole road. In the present case the street was covered with snow and slush, except where the track had been cleaned. The track was the more dangerous, but the more comfortable path for a pedestrian, and in the present case, as the car was moving slowly, the least care on the part of the plaintiff would have prevented the accident. *Warner vs. Ry. Co.*, 141 Pa., 615.

XIV. NEGLIGENCE OF CONDUCTORS. 1. The fact that the conductor of a street car is inside the car when it has slowed up at a street crossing for a passenger, is no evidence of negligence on the part of the railway company. A passenger who attempts to get on board a street car, especially if it is in motion, and the conductor inside, must be held to a reasonable degree of care. A conductor cannot be on the platform at all times. His duty requires him to pass inside frequently to collect fares. *Picard vs. Ry. Co.* 147 Pa., 195. 2. While undoubtedly a conductor of a street railway car would not be justified in forcing a trespassing child, in this case a newspaper boy, to jump from the platform of a moving car, he had a right, as soon as the car should stop, to hasten the boy's exit, in order to facilitate the admission of passengers. Pushing his arm was not a wanton or malicious act. *Phila. Traction Co. vs. Orbann*, 119 Pa., 47. 3. A municipal ordinance of Philadelphia provides, that conductors of passenger railway cars shall stop their cars and cross the tracks of steam railroads in advance of their cars under penalty for failure. Held, that the ordinance does not apply to cars on which one man acts as both conductor and driver. *Phila. & Reading R. R. vs Boyer*, 47 Pa., 92. 4. A passenger is not justified even by the instructions of a conductor, in doing that which is *per se* negligent, or in violating the rules of the company, of which he has notice, which prohibited exit from the front platform. *Reilly*

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vs. *Green St. Ry. Co.*, 4 W. N., 273. 5. The refusal or neglect of a conductor to stop a car when requested, does not justify a passenger in jumping from it while it is in motion. *Hagan vs. Ry. Co.*, 10 W. N., 360. 6. The conductor of a street railway assaulted a passenger while he was upon the car. Held, that while an employer is not responsible for the wilfully tortious acts of an employee as a general rule, yet in this case the conductor violated a duty, and the company was responsible. *Smith vs Ry. Co.*, 17 Phila., 184.

XV. NEGLIGENCE OF GRIPMEN, MOTORMEN AND DRIVERS.

1. The gripman of a cable car should always be on the alert to avoid danger, and his attention should never be diverted from his duties. He should keep his eye constantly on the track before him, and should allow no one to ride with him in the cab. *Schnur vs. Traction Co.*, 153 Pa., 29. 2. A boy riding on a car was wantonly struck by the driver and thereby thrown off the car; the car wheel passed over him. Held, in a suit against the car owners, that they were not liable for the act of the driver in striking the boy, but were liable for negligently driving over him. A master is liable for the wilful conduct of his servant, if within the scope of his authority. *Pittsburg Ry. Co. vs. Donahue*, 70 Pa., 119. 3. Where the gripman of a motor car runs his car at a high rate of speed, reckless of the probable chances of a collision with wagons ahead of the car on the track, and a collision occurs, the question of the company's negligence is for the jury. *Thatcher vs. Traction Co.*, 166 Pa., 67. 4. So long as a common user of streets exist in the public, it is the duty of street railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances of each case. In the present case, the driver of a wagon hitched his horse at a place where there was not room for a street car to pass the end of the wagon. Disregarding the driver's warning to stop, the

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motorman of a car ran into the rear of the wagon. *Kestner vs. Traction Co.*, 158 Pa., 422. 5. The plaintiff was upon the rear platform and about to enter a street car, when the driver whipped up to avoid a collision with a runaway team. The abrupt jolt threw the plaintiff to the ground, when she was struck by the runaway and injured. Held, that even if the car driver was guilty of negligence, such negligence was not the proximate cause of the injury, and the plaintiff could not recover. *South Side Ry. Co. vs. Trick*, 117 Pa., 390. 6. A boy ten years of age got on the front platform of a car by the driver's invitation. Subsequently the driver ordered the boy to get off without stopping the car, though requested by the boy to do so. The boy was injured and sued the company for damages. Held, that the question of the boy's contributory negligence was properly submitted to the jury. *Hestonville Ry. Co. vs. Gray*, 3 W. N., 621. 7. In an action against a passenger railway for negligently running over a pedestrian at a public crossing, evidence that the car was being driven with more than ordinary speed, and that the driver did not see the deceased until after he was run over, is sufficient evidence of negligence to take the case to the jury. *West Phila. Ry. vs. Mulhair*, 6 W. N., 508.

XVI. NEGLECT IN STARTING CARS. 1. Where a street car is stopped so suddenly as to throw a passenger from her seat, and to break a glass in the car window, a presumption of negligence arises on the part of the company. *Clow vs. Traction Co.*, 158 Pa., 411. 2. Although, as a rule, a street car company is not liable for injuries to passengers caused by starting its cars, yet it is so liable when the method taken to start the car is an unusual one. In the present case, the horses were baulky, and the driver of a team of eight mules hitched them to the street car. The team started with a sudden jerk, which threw a woman backward in the aisle, injuring her spine. The question of negligence in such case was for the jury. *Continental Ry. Co. vs. Swain*, 13 W. N., 41. 3. A party attempted to enter a railway car, which had stopped

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for that purpose. At that moment, the driver of the car, seeing a runaway horse coming up a side street, whipped up his horses to avoid collision. The passenger was thrown from the step of the car by the sudden start of the vehicle and was struck and injured by the runaway horse. In an action against the railway company to recover damages, held, that the act of the driver in starting the horses was the remote and not the proximate cause of the injury, and the jury should have been instructed to find for the defendant. *South Side Ry. Co. vs. Trick*, 20 W. N., 325. 4. Where the plaintiff thought a railway car was about to stop on his signal, and that he had a right to attempt to get on, and the car abruptly started before he was safely seated in the car, and an injury resulted therefrom, he is entitled to a verdict for damages. *Walters vs. Traction Co.*, 161 Pa., 36. 5. Where the driver of a bob tail car, under the belief that a female passenger of advanced age had alighted from the car, abruptly started the vehicle, resulting in the passenger being thrown to the ground and injured, held, that the declarations of the president of the railway company, who had no personal knowledge of the accident, and the subsequent discharge of the driver from his position, were not evidence. *Lombard & South Sts. Ry. Co. vs. Christian*, 124 Pa., 114.

XVII. NEGLIGENCE IN RIDING ON PLATFORM. 1. It is not contributory negligence, *per se*, for a passenger to ride on the front platform of a crowded street car without objection by the driver or conductor. The court will not say, as a matter of law, that it is negligence on the part of the company not to furnish a guard for the front platform. In this case, a boy under fourteen got upon the lower step of the front platform, was knocked off by the jolting of the car, run over and injured. Held, that the question of negligence and of contributory negligence were for the jury. *West Phila. Ry. vs. Gallagher*, 108 Pa., 524. 2. It may not be negligence, *per se*, to permit passengers to stand on the platform, yet it is frequently very annoying to persons getting in or out the cars, and to ladies especially offensive. If a conductor permitted a passenger to

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remain standing on the platform in such a position as to deprive an alighting passenger from that support which would have protected her from injury from steps slippery with ice, the jury is the proper tribunal to decide the question of negligence. *Neslie vs. Ry. Co.*, 113 Pa., 304. 3. It is not contributory negligence, *per se*, to stand on the front step of a railway car with the assent of the driver. The risk in traveling at the rate of six miles an hour is not to compare with the risk when the speed is from thirty to sixty miles. An act which would be gross carelessness in a passenger on a train drawn by steam power, might be prudent if done on a horse car. Street railway companies deem their platforms a place of safety, and so do the public. The highest speed of a horse railroad car is very moderate, and the driver easily controls it, and stops the car by means of his voice, his reins and his brake. In turning an angle at the corner of streets, passengers expect he will drive slowly. A street railway company has the right to carry passengers on the platforms of its cars, and if a passenger be injured while standing there, the question of negligence is for the jury. *Germantown Ry. Co. vs. Walling* 97 Pa., 55. 4. Plaintiff, who was riding on the rear platform of a crowded street car, was struck by the pole of the car following, and seriously injured. Held, that in riding in this place, he was not guilty of contributory negligence; that although the accident would not have happened had he not been in that position, yet the position was but a condition and not the cause of the injury, and that the court properly withheld from the jury the question of contributory negligence. *Thirteenth St. Ry. Co. vs. Boudrou*, 92 Pa., 475. 5. Even if a street car rear platform be not necessarily a dangerous place for a passenger who could find no room in a crowded car, the question arises did he use proper and ordinary care while there. If he sat upon the railing, or did not use proper care to prevent himself being pushed off or falling off, then he was negligent. If he was requested by the conductor to go inside the car, and refused or neglected to do so,

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and was standing with but one foot on the step, and clinging to the dasher, though a mere child of fourteen, he was guilty of negligence. *Randall vs. Ry. Co.*, 139 Pa., 464. 6. It is not contributory negligence on the part of a passenger to ride on the platform of a street car. In the present case the plaintiff was standing on the rear platform of defendants' car, from which he was dislodged by a sudden jolt and swing of the car as it was driven rapidly round a curve, was thrown into the street and badly injured. *Dickson vs. Ry. Co.*, 19 Phila., 430. 7. It is not of itself negligence, either on the part of a passenger or on the part of a street railway company, that an adult or a person reasonably competent to take care of himself, should occupy by permission a place on a platform of a crowded passenger car. The carrier, however, is bound to higher care and vigilance, when the platform is crowded, as that place is more dangerous than a seat inside the car. In the case of children of tender age, it is held to be gross negligence to allow them to ride on the front platform of a crowded car. *Sandford vs. Ry. Co.*, 136 Pa., 92. *Pittsburg Ry. Co. vs. Caldwell*, 74 Pa., 421. 8. It is not negligence in a passenger on a railway car to occupy a dangerous place on the car, if it is the only one that he can find, and his so doing is assented to by the company's agent. One who voluntarily stands on the platform of a car is not within this principle, and it does not necessarily vary the case, that the conductor collects his fare without requiring him to take a less exposed position; but receiving a passenger when there is no sitting or standing room within the car, is a tacit assurance that he will be reasonably safe outside. *Walling vs. Ry. Co.*, 12 Phila., 309. 9. Where a passenger alighted from the front platform of a moving car, held, that he was guilty of contributory negligence. *Fry vs. Ry. Co.*, 17 Phila., 61. 10. It was contributory negligence for a man to mount the step of a moving car, and instead of passing within, remain on the step, where he was struck therefrom by a standing post, with the position of which he was familiar. *Aitkin vs. R. R.*, 142 Pa., 47.

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XVIII. NEGLIGENCE IN CARE OF PASSENGERS. 1. In the case of passengers, carriers are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable. In other cases, they are bound to the exercise of ordinary care only. *Pitcher vs. Ry. Co.*, 2 Lackawanna Jurist, 87. 2. The happening of an accident to a passenger on a street car, if the accident is connected with the means of transportation, raises a presumption of negligence on the part of the company. *Clow vs. Traction Co.*, 158 Pa., 410. 3. The rule that where a passenger is injured without his fault, the burden of disproving negligence is upon the railroad company, does not apply where the injury comes wholly from without, and does not result from any defect in the track, cars, machinery or motive power. *Federal St. Ry. Co. vs. Gibson*, 28 **Pittsburg Journal**, 247. 4. In an action against a street railway company to recover damages for an injury to a passenger caused by a collision with another car of the defendant company while turning a curve, the fact that the plaintiff was sitting with his arm resting on the window sill wholly within the car, and by the jolt it was thrown out and injured, is not contributory negligence, *per se*. *Germantown Ry. Co. vs. Brophy*, 105 Pa., 38. 5. Where a traveler puts his elbow or arm out of a car window voluntarily and without any compelling cause, it must be regarded as negligence, *in se*. The unconscious projection of the arm beyond the window makes no difference. But the mere resting of the arm on the window sill without protrusion cannot be regarded in itself as an act of contributory negligence. *Peoples Ry. Co. vs. Lauderbach*, 4 **Pennypacker**, 406. 6. Where a passenger in a railway car is injured by the act of a third party, over whom the railway company has no control, the passenger must show not only that the company was guilty of negligence, but that he was not guilty of contributory negligence. A passenger on a street car was struck and injured by a passing load of hay. If the injury or its proxi-

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mate cause in part at least was caused by the sole negligence of the driver of the wagon, or if the passenger himself contributed to the injury, there should be no recovery against the company. It was for the plaintiff to prove the negligence of the company. The burden of proof was not upon the company to disprove negligence. *Federal St. Ry. Co. vs. Gibson*, 96 Pa., 83. 7. Where, in a crowded passenger car, a woman passenger was unable to obtain a seat, and, owing to a close-fitting dress, could not avail herself of the straps suspended from the roof of the car, and by the sudden stopping of the car was thrown on the floor and badly injured, it was for the jury to say whether she was guilty of contributory negligence. *West Phila. Ry. Co. vs. Whipple*, 5 W. N., 68. 8. A lady passenger in a crowded street car is bound to hold on to the straps suspended from the roof of the car, if with ordinary convenience she can do so, to avoid accident. But she is not to be held to the same strict rule as a man in such cases. Her physical formation and her mode of dress may render it difficult for her to reach the straps. In this case, the car came to a sudden stop by encountering an obstruction at the terminus of its route, and a lady passenger standing in the aisle of the car and not holding on the straps, was thrown on her face on the floor of the car and seriously injured. The jury awarded her damages. *Whipple vs. Ry. Co.*, 11 Phila., 345. 9. In an action against a street railway company for negligently overcrowding the cars, resulting in a passenger being pushed off the platform and injured, where the evidence shows that the passenger was alone on the platform, and was pushed therefrom by passengers leaving the car, who were not disorderly, held, that the plaintiff was not entitled to recover. *Randall vs. Ry. Co.*, 8 Pa. County, 277. 10. It is the duty of a street railway in the construction of its cars, to provide against every danger to passengers that is to be reasonably apprehended; but not against such as are so remote as to be hardly possible. The passenger himself should display reasonable circumspection and care. In the present case, there

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was a small space between the back of the step of a summer car and the floor. In endeavoring to get off the step, the foot of the passenger slipped through this opening, and he was injured. The railway company was held not liable. *Keller vs. Ry. Co.*, 149 Pa., 65. 11. The elevation of a portion of the floor of the summer car of a railway caused by the sheathing of the wheels, leaving ample room to enter and leave the car, is not negligence, and a party injured by tripping over it cannot recover damages. *Farley vs. Traction Co.*, 132 Pa., 58. 6 Pa. County, 347. 12. The title of the finder of a chattel who acts with fairness is superior to that of any other person but the owner. The conductor of a railway car is entitled to money found by him in the car, no owner having appeared to claim the same after advertisement made. *Tatum vs. Sharpless*, 6 Phila., 18.

XIX. NEGLECT BY EJECTING PASSENGER. 1. A railway company is liable in damages for the ejection of a passenger for non-payment of fare, where he had dropped the fare in a box in obedience to the posted rules of the company, and had no knowledge of the private directions to the drivers to go through the cars and collect the fares. *Perry vs. Ry. Co.*, 153 Pa., 236. 2. A street railway company, in ejecting a trespasser from a car, owe him such care as to avoid endangering his life and limb. It is such negligence as will render the company liable for damages, for their driver to compel a child to jump from the platform of a car in motion, even though he be a trespasser. *Biddle vs. Ry. Co.*, 112 Pa., 551. 3. A person who drops his money in a street car is entitled to remain on the car a reasonable length of time to look for it. In the present case, the passenger in attempting to hand his fare to the conductor dropped it in the straw on the floor of the car, and while searching for it was ordered by the conductor to produce other money or leave the car. Failing to do so, he was forcibly ejected. *Hall vs. Ry. Co.*, 14 W. N., 242. 4. A conductor of a passenger car has no right to eject a passenger on account of color or race. No regulation of the company will justify

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such a proceeding or protect him from liability in damages. *Derry vs. Lowry*, 6 Phila., 30. 5. Where the hour on the transfer ticket of a street railway was wrongly punched just as the party was leaving the car, when he had applied for it some time before, and notwithstanding his explanations to the conductor of another car to whom he handed the transfer ticket, he was forcibly ejected, held, that he was entitled to recover damages, which are not limited in an amount sufficient to compensate him for the inconvenience caused him by the delay resulting from being put off the car. He was entitled to substantial damages for the trespass. *Laird vs. Traction Co.*, 166 Pa., 4.

XX. NEGLIGENCE IN BOARDING CARS. 1. It is the duty of a railway company to cause its cars to come to a full stop, to permit a passenger to alight. As a general rule, the question of negligence is for the jury. Negligence is dependent upon the circumstances of the case, and is for the jury where the measure of duty is not unvarying. A higher degree of care is demanded in some cases than in others. *Crissey vs. Hestonville Ry. Co.*, 75 Pa., 83. 2. A failure of a railway car to stop on signal does not justify a boy of twelve years of age in jumping upon the cars when in motion, although urged to do so by a passenger. *Colter vs. Ry. Co.*, 15 Phila., 255. 3. It would seriously inconvenience the traveling public to hold that a railway car should come to a dead stop until every passenger who gets on is seated. It would delay travel on street cars seriously. Regard must be had to the habits of passengers and their convenience. But if a man attempts to board a moving car he does so at his own risk. *Picard vs. Ry. Co.*, 147 Pa., 196. 4. It would be a hard rule to hold a passenger guilty of contributory negligence in attempting to board a street car moving so slowly that there would be no apparent danger in the attempt. In all cases of doubt the question must be left to the jury. Nor can we say that the act of entering the car by the front platform, when the car was in motion, regardless of its rate of speed, was an act of

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negligence, *per se*, as there was no known rule of the company against it. But the plaintiff cannot recover without showing some negligence on the part of the employees of the company. In the absence of proof of negligence, a nonsuit was proper. *Stager vs. Ry. Co.*, 119 Pa., 70. 5. When the plaintiff, in an action against a street railway company for alleged negligence, received his injuries while attempting to board the defendant's car while in motion, his foot slipping from the step owing to a jolt of the car, it was not error to enter judgment of nonsuit. *Reddington vs. Traction Co.*, 132 Pa., 154. 6. Public carriers of passengers must provide reasonably safe means of ingress and egress from their cars. They must also take care of them after they have entered. This is the extent of their duty. In the present case, damages were awarded a woman who, on invitation of the motorman, entered a street car from the front platform, and before she was able to take her seat, the car was started with a jerk, resulting in her being thrown on the floor and injured. *Holmes vs. Traction Co.*, 153 Pa., 152. 7. It is the duty of a party seeking transportation on a street car to inform the conductor in some manner, especially where he attempts to board the front platform. *Pitcher vs. Ry. Co.*, 6 York Record, 43. 9 Lancaster Review, 276.

XXI. NEGLECT IN ALIGHTING FROM CARS. 1. It is contributory negligence in a passenger jumping from the front platform of a city car while it is in motion. *Colgan vs. Ry. Co.*, 4 W. N., 400. 2. Jumping from a street car while it is in motion is negligence. The refusal or neglect of a conductor to stop a car when requested, does not justify a passenger in jumping off. *Hagan vs. Ry. Co.*, 10 W. N., 360. 15 Phila., 278. 3. If the plaintiff was an adult of ordinary discretion and intelligence, he would have been chargeable with negligence in jumping from the car while it was in motion, and an injury resulting therefrom would properly be attributed to his own folly and imprudence. But the law does not exact the same degree of care and prudence from a

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mere boy, who may not have the ability to foresee and avoid danger to which he may have been exposed, by having been allowed to ride on and leap from the front platform.

Phila. City Passenger Ry. Co. vs. Hassard, 75 Pa., 367.

4. The implied contract of a railway company to carry a passenger safely includes the duty of giving him a reasonable opportunity to alight in safety. *Fairmount Railway vs. Stutler*, 54 Pa., 375.

XXII. NEGLIGENCE TO PROTECT CHILDREN. 1. No inference of negligence on the part of a railway company for an injury to a young child while crossing the tracks is to be drawn from the tender age of the child, or from the mere fact of the injury. Negligence must be affirmatively shown; and the party alleging it assumes the burden of proof. No question of contributory negligence can arise in the case of a child of four years of age. *Citizens' Ry. Co. vs. Foxley*, 107 Pa., 537.

2. While contributory negligence cannot be imputed to a child five years old, where such child unexpectedly runs from the pavement against a moving traction car, such fact is not evidence of negligence on the part of the railway company so as to render it liable. It is a grave error to submit the evidence of negligence to the jury, where there is no evidence of it. The defendant company in such case is entitled to a binding instruction in its favor. *Chilton vs. Traction Co.*, 152 Pa., 425.

3. The mere fact that a child of tender years placed himself in a dangerous position on a railway track, will not relieve the railway company from liability for an injury to the child, if the negligence of the company contributed to the injury. *Johnson vs. Ry. Co.*, 160 Pa., 647. 4. To a child of tender years, no contributory negligence can be imputed. Damages were obtained in a suit brought by a child of four years, through her next friend, against a railway company for the alleged negligence of the driver of what is termed a bob-tail car in not looking out between the crossings of a street, but in conversing at the time with a passenger. *Erie Ry. Co. vs. Schuster*, 113 Pa., 412. 5. If a child, on account of his age

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and inexperience, could not take proper care of himself, the employees of the railway company carriers were bound to the highest care and vigilance to secure his safety. They should prevent children from getting on or off the front platform of a car. The same degree of care and prudence is not to be exacted from a mere boy as from an adult. A child's capacity is the measure of his responsibility; if he has not the ability to foresee and avoid danger, negligence will not be imputed to him. *Phila. City Passenger Ry. Co. vs. Hassard*, 75 Pa., 367.

6. The fact that the injured person was of tender years will not supply the want of proof of negligence on the part of the defendant. In the present case, a boy of thirteen sat upon the upper step of the front platform of a crowded street car with his knees projecting slightly beyond the side of the car. He was struck by a mortar box near the track and was injured. There was no direct evidence that the conductor had seen the boy, or knew of his dangerous position. Held, it was not error to enter a compulsory nonsuit. *Butler vs. Ry. Co.*, 139 Pa., 195. *Randall vs. Ry. Co.*, *Idem*, 464.

7. What might be gross contributory negligence in an adult pursuing a daily avocation, may be excusable in a person of tender years. In the present case, the car was approaching a crossing at an undue rate of speed. A child standing between the tracks behind a passenger car was frightened by the approach of a horse and started to run across the adjacent tracks, when he was injured by being struck by a rapidly moving car. *Warner vs. Ry. Co.*, 6 Phila., 537.

8. A boy of sixteen years of age is not an infant of such tender years as to relieve him from the effect of contributory negligence in jumping from the front platform of a city car in motion. *Colgan vs. West Phila. Ry.*, 4 W. N., 400.

9. The streets of a city are for the use of the public in general, and even children may have the benefit of them. The driver of street cars must use such care in handling their horses and managing their cars, as the exercise of such right by the public renders necessary. The summer outing of the children of

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humble parents extends no further than the front doorstep, and they are entitled to get so much of enjoyment as it can furnish them. *Reinike vs. Traction Co.*, 2 Pa. Dist., 319.

10. When a child only four years of age is run over by a street car, no question of contributory negligence can arise. If there is any evidence, more than a mere scintilla from which negligence on the part of the defendant can be inferred, that inference must be drawn by the jury, and not by the court. *Citizens' Ry. Co. vs. Foxley*, 33 *Pittsburg Journal*, 88.

11. Where a boy eleven years of age, a passenger on a street car, without asking the driver or conductor to stop, jumps from the front platform of a moving car, he is guilty of contributory negligence, and cannot recover for injuries thereby received. *Purtell vs. Ry. Co.*, 3 Pa. County, 273. 12. It is negligence for the driver of a street railway car to compel a child to jump from the front platform of a car in motion, even though he be a trespasser. *Biddle vs. Ry. Co.*, 112 Pa., 551.

13. While it is the duty of the driver of a street car to compel trespassing boys to get off the front platform of the car, and to use reasonable force if necessary, yet he is not justified in compelling a child to jump from the car while it is in motion. If an injury results therefrom, the railway company is liable in damages. *Hestonville Ry. Co. vs. Biddle*, 24 W. N., 156.

14. In an action for personal injuries, plaintiff, a girl eleven years old, testified that on her way from school, she got on the front platform of a street car while it was in motion, and held on by the handrail; that the driver saw her, whipped up his horses, struck plaintiff on the hands, and finally pushed her off the car, so that she fell under it and was run over. Even trespassers are entitled to humane consideration, and the plaintiff's youth exempted her from the charge of being a trespasser, in the legal signification of the word. The jury properly awarded her damages. *Barre vs. Ry. Co.*, 155 Pa., 170. 15. It is for the jury to determine the question of negligence where a boy of eight years on the front platform of a street car was disputing with a conductor as to a transfer

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ticket, and, frightened by the act of the conductor, jumped from the moving car and was injured. *Sanford vs. Ry. Co.*, 153 Pa., 300. 16. The deceased, a boy of four years of age, while playing in the street, trespassed upon one of the defendant's cars, and was compelled to leave it by the driver, who struck him twice with the whip. To escape this, the boy ran upon the other track and fell under the wheel of another car moving thereon. Held, that there could be no recovery, as the cause of the injury was remote. *Mack vs. Ry. Co.*, 20 Phila., 207. 17. Where a boy four years of age, permitted by his parents to play on the street, caught hold of the rear brake of a street car, from which he was forcibly removed, and running across a parallel track, was fatally injured by a car, held, that the act of the conductor in driving him off the first car was not the proximate cause of the injury. *Mack vs. Ry. Co.*, 8 Pa. County, 305. 18. In an action by a father against a railway company for damages for the death of his son, the declaration of the son, immediately after the accident, that he had jumped from the car, was admissible, (1) As an admission against interest. (2) As a part of the *res gestæ*. *Stein vs. Ry. Co.*, 10 Phila., 440. 19. In a suit against a railway company by the father of a boy of ten years of age, to recover damages for injuries resulting from his falling under the wheels of a car upon jumping from the front platform, declarations of the boy made immediately after the accident exonerating the driver, are in evidence. In the present case, the boy was not a passenger, but was a trespasser. *Wrasse vs. Traction Co.*, 146 Pa., 417. 20. A boy of eight years of age attempted to board a street car. The car was not in motion, and the lad took hold of the rail attached to the front end of the car, and was in the act of stepping on the car when, without any notice or warning to him, the car was suddenly started forward and he was thrown under the wheels. Damages were awarded him for the injury. *Pitcher vs. Ry. Co.*, 2 Lackawanna Jurist, 87. 21. In an action to recover damages for

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the death of a boy of twelve years, plaintiff's evidence showed that the boy jumped across a ditch which was alongside of the defendant's track, and while looking into the ditch was struck by a car which was running at a very high rate of speed, without any bell being rung. The evidence for the plaintiff showed that the boy ran alongside of the ditch a short distance, and then ran in front of the car and was killed. Held, that the case was for the jury. *Jaquinta vs. Traction Co.*, 166 Pa., 63. 22. Parents should see that their children of tender years when on the streets should be properly guarded, and it is negligence for the driver of a street railway car not to watch out for children who are wandering on the tracks. *Reinike vs. Traction Co.*, 31 W. N., 471. 23. In an action against a street railway company to recover damages for the death of plaintiff's child, it is proper to submit to the jury the question of defendant's negligence, where proof was given that the car was running at such a high rate of speed that it ran thirty-five feet beyond the crossing where the child was killed before it could be stopped. *Dunseath vs. R. R.*, 161 Pa., 124. 24. A child of six and a half years of age cannot be held responsible for contributory negligence. A railway company was held liable in damages for the negligence of a drunken driver in running his car so rapidly as to run over a child who was making a confused attempt to cross the track at a travelled street crossing. *Lombard St. Ry. Co. vs. Steinhart*, 2 **Penny-packer**, 358. 25. Where, without the permission of the driver of a street railway car, a child of seven years of age rode for a moment on the front platform, and upon his hat blowing off leaped after it, slipped under the car wheels and was killed, held, that in the absence of proof of negligence on the part of the driver, damages were not recoverable against the company. *Hestonville Ry. Co. vs. Kelley*, 102 Pa., 115. 26. A driver or conductor of a street railway car is guilty of negligence in allowing children of tender years to get on or off the front platform of the car, or to ride there. If they do, negligence is imputable to the company, and it will be held

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responsible for any injury occasioned thereby. If the child got on the front platform without the driver's permission, it was his duty to compel it to go inside the car, or to stop the car and put the child off. Negligence in such case could not be imputed to a young child who has not sufficient capacity or discretion to understand the danger and to use the proper means to guard against it. *Pittsburg Ry. Co. vs. Caldwell*, 74 Pa., 424. *Crissey vs. Ry. Co.*, 75 Pa., 83. *Phila. City Ry. Co. vs. Hazzard*, *Idem*, 367. 27. A nine-year-old boy jumped on the front platform of a horse car at the invitation of the driver, who afterwards made him get off while the car was in motion. He fell and was injured; held, that the question of negligence was for the jury under the circumstances. *Hestonville Ry. Co. vs. Grey*, 1 Walker, 613. 28. In a suit for damages against a railway company for the death of a young child, evidence that in disregard of the warning of the driver of the car, the child attempted to run past it and was run over, warrants a nonsuit. *Flanagan vs. Ry. Co.*, 163 Pa., 402. 29. Where a child of seven years attempts to get upon the platform of a street car, which has stopped to let off a passenger, but neglects to signal to the driver or conductor, and is injured by the car starting in its ordinary course, there can be no recovery of damages from the railway company, where the evidence fails to show that the driver or conductor saw him. *Pitcher vs. Ry. Co.*, 154 Pa., 560. 30. Though an infant of tender years may recover for an injury, partly caused by his own imprudent act, the father cannot. If a father permits a child of tender years to run at large without a protector, in a city traversed constantly by cars and other vehicles, he fails in the performance of his duty and is guilty of negligence. The fact that a young child having parents is found alone in the street, is presumptive evidence that he was exposed negligently. The duty is the greater when the risk is imminent. *Glassey vs. Hestonville Ry. Co.*, 57 Pa., 472. *Pittsburg Ry. vs. Pearson*, 72 Pa., 169. 32. It was held to be contributory negligence for a mother, for a small compensation,

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to allow her child of seven years to serve the drivers and conductors of railway cars with water to drink, by reason of which dangerous employment the child was injured. *Smith vs. Ry. Co.*, 92 Pa., 450.

XXI. DAMAGES FOR NEGLIGENCE. 1. A verdict for six cents in an action against a railway company for negligence, where there is uncontradicted evidence as to the serious nature of the plaintiff's injuries, his actual outlay for surgical attendance, his loss of earning power, etc., is a mere travesty of justice. *Bradwell vs. Ry. Co.*, 27 W. N., 264. 2. In an action to recover for an injury caused by the defendant's negligence, no damages will be allowed for any speculative or merely possible consequences of the wound. Compensation will be awarded only for that which the plaintiff has actually suffered, unless the evidence indicates that the injury will become more serious. *Jewell vs. Ry. Co.*, 16 Phila., 64. 3. In an action for damages by reason of injuries received in a street car through the negligence of a railway company, brought by one who had previously met with a severe accident, it is a question of fact for the jury whether the injuries complained of were caused alone by defendant's negligence, or were attributable to his former accident. *Tietz vs. Traction Co.*, 36 W. N., 469. 4. The act of April 4, 1868, limits the time within which actions may be brought against passenger railways for injuries or death to six months after the right of action has accrued. *McCarthy vs. Hestonville Ry. Co.*, 1 W. N., 312.

Real Estate.

I. NEGLIGENCE BY ABANDONMENT. Lands that were once seated may be suffered to fall into their natural state and become unseated, when the property is entirely abandoned for an unlimited time. It requires stronger evidence that a house and lot in town have been abandoned and become unseated, than a tract of land which was never improved and but

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merely temporarily cultivated. *Stewart vs. Trevor*, 56 Pa., 374.

II. NEGLIGENCE BY MISREPRESENTING VALUE. Where one cognizant of the occult qualities or internal values of land, misrepresents the facts differently to the prejudice of the owner, he is liable in damages. *Paull vs. Halferty*, 63 Pa., 46.

III. NEGLIGENCE IN AMOUNT SOLD. An action on the case for a deceit in falsely representing that a farm contained a certain number of acres, is not a bar to an action of *assumpsit* upon a guaranty that the farm contained that number of acres. *Schriever vs. Eckenrode*, 87 Pa., 213.

IV. NEGLIGENCE IN CONVEYING. A voluntary conveyance of real estate made by one indebted is not void as to creditors, if the voluntary grantor, at the time of conveyance, retained other property amply sufficient to pay his debts. *Kline vs. Bank*, 2 Monaghan, 458.

V. NEGLIGENCE IN DESCRIPTION. Where land was sold and through an uncertainty as to county lines, the deed described it in the wrong county, though it was otherwise correctly described, and there was no fraud on the part of the vendor, held, that he was not liable to the vendee in damages. *Holmes vs. McGee*, 6 W. N., 265.

VI. NEGLIGENCE IN INDUCING PURCHASE. One who by positive acts has induced another to purchase land of which he himself is the true owner, is thereafter estopped from setting up his title against the purchaser, even though he acted in good faith and in ignorance of his own rights. *Putnam vs. Tyler*, 117 Pa., 571.

VII. NEGLIGENCE IN PAROL CONTRACT TO SELL. 1. In an action for breach of a parol contract for the sale of land, the measure of damages is the actual consideration passing between the parties. If the consideration be services, they are to be compensated according to their value; if money, the amount with interest. *Ewing vs. Thompson*, 66 Pa., 382. 2. In order to take a parol contract for the sale of land out of the opera-

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tion of the statute of frauds, its terms must be shown by complete, satisfactory and indubitable proof. The evidence must define the boundaries and indicate the quantity of the land, and fix the amount of the consideration. It must show an immediate and notorious change of possession, and that it was exclusive, continuous and maintained. It must show part performance at least by the vendee, which could not be compensated in damages, and such as would make rescission unjust. There must be proof of expenditure for improvements not reimbursed by profits, and not capable of compensation in damages recoverable in an action for breach of the contract. *Hart vs. Carroll*, 85 Pa., 510. 5 W. N., 376 3. To take the case of a parol sale of land out of the statute of frauds, the vendee must take actual, notorious, exclusive and continuous possession of the premises in pursuance of the contract, and where the whole purchase money has not been paid, must have made such improvements thereon as cannot reasonably be compensated in damages. *Miller vs Zufall*, 113 Pa., 317.

VIII. NEGLECT IN PURCHASING. The law will not tolerate that a public officer, charged with selling the lands of citizens, should be directly or indirectly interested as purchaser of the lands so sold. *Powell vs. Barrington*, 1 Clark 239.

IX. NEGLECT IN REPRESENTATIONS. In negotiating for the sale of a farm, the vendor assured the vendee that the neighborhood was free from sickness, whereas it was subject to fever and ague. It was held, the agreement could not be enforced. *Holmes' Appeal*, 77 Pa., 50.

X. NEGLECT IN SEARCHES. Searches for judgments against real estate should be made in both districts of the United States circuit court of Pennsylvania, and not merely in the district of the state where the real estate affected is located. *Provost vs. Gorrell*, 5 W. N., 152.

XI. NEGLECT IN TITLE. 1. A doubtful title which exposes the holder of it to litigation is not marketable, and the rule in equity is that the purchaser will not be compelled

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to accept it. *Holmes vs. Woods*, 168 Pa., 530. *Dean vs. Russell*, 1 Lackawanna Jurist, 400. *Doebler's Appeal*, 64 Pa., 9. *Swayne vs. Lyon*, 67 Pa., 436. 2. Where real estate is held by a title, which is regular on its face, a *bona fide* mortgagee is not liable to be affected by any secret trust or equity, if he be without notice thereof. *Sweetzer vs. Atterbury*, 100 Pa., 18.

XII. NEGLECT IN TITLE AND QUANTITY OF LAND. There is a difference between failure of title and a deficiency in the quantity of land. In the former case, where the purchase money has not been paid, the purchaser may defend against its recovery by showing that the title is defective. In the latter case, more must be shown than a mere deficiency in quantity to entitle the purchaser to relief, unless the deficiency is so great as to clearly evince fraud or gross mistake. If there be fraud, deception or concealment, relief will be given. *Williams vs. Keast*, 6 Luzerne Register, 247.

XIII. NEGLECT OF AGENT IN PURCHASING. Good faith requires, that the agent employed by parties to purchase land should charge his associates or principals no more than he actually paid for the property. If, however, as an individual, he purchased the land, and disclosed the actual sum paid, and refused to sell except at an advance sum, the transaction would be unimpeachable. *Short vs. Stevenson*, 63 Pa., 95.

XIV. NEGLECT OF NOTICE OF TITLE. Where one purchases land at private or judicial sale, for valuable consideration, from a person in whom the title is apparently vested, without notice or knowledge of any other title, and in absence of facts to put him on inquiry for such other title, he may hold the land against any title of which he had no notice or knowledge. Where there is a continuous or apparent easement or servitude, the purchaser of the land is bound to take notice, and he takes title subject thereto. So, where there is an apparent dedication of land to public use. *Schuchman vs. Homestead Borough*, 111 Pa., 55.

XV. NEGLECT OF OWNER TO ASSERT TITLE. 1. Where a

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party conveyed unimproved land to another by deed absolute on its face, and subsequently alleged the conveyance was in trust, the burden was upon him to show the trust, and that it had been recognized and kept alive by the acts and declarations of the parties. The vendor must have re-taken possession of the land, or exercised exclusive acts of ownership within twenty-one years. *Lingenfelter vs. Rickey*, 62 Pa., 123. 2. Where one encourages another to settle on land, and expend money and labor upon it, he cannot afterwards take the land from the improver, although he has an older and better title, and is ignorant of his rights. *McCormick vs. McMurtrie*, 4 W., 195. *McKelvey vs. Truby*, 4 W. & S., 323. *Miller vs. Miller*, 60 Pa., 22. 3. Where an owner of land, in ignorance of his title thereto, by a positive act induces a party to purchase said land from a third person, all the parties acting in good faith, he cannot afterwards, when he discovers his true title, set it up against the purchaser. *Miller's Appeal*, 84 Pa., 391. 4. Where one holds land for himself, taking no profits for twenty-one years, with no evidence to stamp upon it a different character, the presumption, except as to co-tenants, is that the possession is adverse. *Neel vs. McElhenny*, 69 Pa., 300. 5. Open, notorious and uninterrupted possession of the whole land by a tenant in common for twenty-one years, claiming it as his own and taking all the profits, is evidence from which a jury may draw the conclusion of ouster and adverse possession. *Susquehanna Coal Co. vs. Quick*, 61 Pa., 328.

XVI. NEGLECT OF PRIOR TITLE. One who purchases lands, though for a valuable consideration, with knowledge that another has acquired a prior right, either legal or equitable, is treated as acting *mala fide*, and is not allowed to reap any advantage from his acts. *Britton's Appeal*, 45 Pa., 174.

XVII. NOTICE ON THE PART OF PURCHASER. 1. Where a parol contract for the purchase of lands has been carried on *mala fide*, there is a resulting trust, and equity will decree a conveyance. Equity will not permit one to hold a benefit, which he has obtained by fraud, either of himself or another.

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Boynton vs. Housler, 73 Pa., 453. 2. Every purchaser of land must be presumed in equity to know whether the possession be vacant or not ; and if a third person be in the actual and visible occupation of the land at the time of his purchase, it is sufficient to put him on inquiry to know by what terms or right such person holds the possession ; and whatever is sufficient to put the party upon inquiry is equivalent to notice in equity. *Jacques vs. Weeks*, 7 W., 276. *Hottenstein vs. Lerch*, 104 Pa., 460. 3. The possession which affects a purchaser with notice must be clear, open, notorious and unequivocal. An act done upon the land, which may lead to an inference of trespass as well as of title, is insufficient. *Meehan vs. Williams*, 48 Pa., 241. 4. Where a purchaser of land refuses to take it, the title being a good and marketable one, he makes himself liable for the entire purchase money immediately. *Murray vs. Ellis*, 112 Pa., 485. 5. Where the owner of real estate advertised the property for sale, and added the phrase : " Parties negotiating for purchase are required to examine the foregoing statement, and exercise their own judgment as to its correctness," it is negligence in the purchaser not to make further examination, for an advertisement is not like a representation of fact made directly to the purchaser. *Wallace vs. Hussey*, 63 Pa., 24.

XVIII. NEGLECT OF PURCHASER OR ENCUMBRANCER. The actual, visible possession of land is constructive notice to purchasers or mortgagees of the occupant's title, unless he has put on record a title inconsistent with the possession. A purchaser or mortgagee of land which is in the possession of an occupant, other than the holder or grantor of the recorded title, is bound to inquire of the occupant as to the title under which he is in possession. *Rowe vs. Ream*, 105 Pa., 543. 31 *Pittsburg Journal*, 418. *Lord's Appeal*, *Idem*, 451.

XIX. NEGLECT OF TENANT IN COMMON. A tenant in common may not purchase an encumbrance or an outstanding title and set it up against the rest for the purpose of depriving them of their interests. *Tanney vs. Tanney*, 159 Pa., 277.

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XX. NEGLECT TO BRING A FAIR PRICE. A sale of real estate by a master in chancery will be set aside, if, before the confirmation of the same, a higher price be offered, even though no fraud be shown. The bid at such a sale is merely an offer to purchase, subject to the approval of the court. *Fourth Avenue Church vs. Bailee*, 2 Schuylkill Record, 169.

XXI. NEGLECT TO CONVEY. 1. The measure of damages for breach of a parol contract to convey land is the consideration and compensation for improvements in reliance on the contract, deducting a reasonable rental for the premises; except when there has been fraud on the part of the vendor in the original contract. *Harris vs. Harris*, 70 Pa., 170. 2. The measure of damages for the breach of a parol contract to convey land is the money paid, and the expenses incurred on the faith of the bargain. *Hughes vs. Heintzleman*, 2 Walker, 426. 3. Where the vendor of real estate without fraud on his part is incompetent to make out a title, the vendee is not entitled to damages for the loss of his bargain beyond the money paid with interest and expenses. *McNamara vs. McIlhenny*, 7 Phila. 103. 4. The buyer can recover from the seller for breach of a parol contract to sell and convey land so much of the purchase-money as was actually paid. It is no defence, that the terms of the contract were not definite. *Milligan vs. Dick*, 107 Pa., 265.

XXII. NEGLECT TO ESTABLISH TITLE. Laches will not be imputed to one in peaceable possession of land, for delay in resorting to a court of equity to establish his legal title. The possession is notice to all of the possessor's equitable rights, and he need only assert them when he may find occasion to do so. *White vs. Patterson*, 139 Pa., 438.

XXIII. NEGLECT TO GIVE GOOD TITLE. 1. When a vendor, not wilfully or fraudulently, but because he is unable to make title, does not fulfil his contract, the vendee can recover only what he may have paid and his expenses, not damages, for the loss of his bargain. *Bowser vs. Cessna*, 62 Pa., 148. 2. A marketable title in equity is one in which

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there is no doubt involved either as to matter of law or fact; and such a title only will a purchaser be compelled to accept. *Dalsell vs. Crawford*, 1 Parsons, 37. 3. When the subject of a contract is the land itself, the purchaser has a right to a title clear of all defects and encumbrances, and in an action for the price, may show that the title is defective. *Herrod vs. Blackburn*, 56 Pa., 103. 4. The law in Pennsylvania is well settled, that where a man agrees to purchase lands clear of encumbrances, or with a good and perfect title, and not having paid all the purchase money, is sued for the same, he may defend by showing that the title was defective, either in whole or in part. *Powel vs. Barrington*, 1 Clark, 239. 5. Where land was sold by parol, price paid, possession delivered, assessment for taxation changed, taxes paid, and control of the land by fixed boundaries held by the vendee for forty years, the possessor is not to be held in ejectment against him by the holder of the legal title, to the same strictness of proof of the contract required in a recent bargain. It is not necessary, that the defendant's possession should have been the continued, actual, resident and hostile possession required of a trespasser to sustain a claim of title under the statute of limitations. The vendee was not guilty of laches in not compelling a decree for a specific performance of the contract. *Richards vs. Elwell*, 48 Pa., 361. 6. If the consideration money for land has not been paid, the purchaser, unless he has assumed the risk of title, may defend himself in an action for the purchase money, by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty or of right to convey, or quiet enjoyment by the vendor or not, and whether the vendor has executed the deed or not. *Youngman vs. Linn*, 52 Pa., 416.

XXIV. NEGLECT TO PERFECT PURCHASE. A vendee of real estate, who has bargained for a good and marketable title, will not be compelled to accept the property if it is burdened with a building restriction which will impair its enjoyment or

Real Estate—Continued.

affect its marketable value. A judicial sale for taxes does not remove such restriction. *Lesley vs. Morris*, 9 Phila., 110.

XXV. NEGLECT TO RETAIN POSSESSION. An abandoned title is not transferred to an adverse claimant or person who first seizes the land, but it falls back to the state, and by its extinction sometimes makes a younger and conflicting title good. A stranger will not acquire title by payment of taxes on unoccupied land. Actual possession is necessary to acquire title under the statute of limitations. *Bear Valley Coal Co. vs. Dewart*, 95 Pa., 72.

XXVI. NEGLECT TO TAKE POSSESSION OF. 1. To take a parcel sale of land out of the operation of the statute of frauds, a vendee must take actual, open, notorious and exclusive possession of the premises in pursuance of the contract, and make such improvements thereon as cannot be compensated in damages. *Detrich vs. Sherrar*, 95 Pa., 521. 2. A vendee of land under an unrecorded contract, who has for years neglected to take possession, is guilty of great laches. *McGrew vs. Foster*, 113 Pa., 642.

Real Estate Brokers. See "BROKERS."

NEGLECT TO EFFECT SALES. There must be an employment to constitute a real estate broker an agent, and his services, however slight, must have been the efficient cause of the sale to entitle him to commissions. If his services do not accomplish a sale, he has no claim to remuneration. *Earp vs. Cummins*, 54 Pa., 394.

Receipts.

I. NEGLECT IN GIVING. A receipt is open to contradiction, explanation or correction, and may be shown to have been given under a mistake either of fact or law. *Russell vs. Pottsville Church*, 65 Pa., 9. *Shoemaker vs. Stiles*, 102 Pa., 549.

II. NEGLECT IN ITS TERMS. A receipt is always open for explanation, and though given "in full of all claims," will

Receipts—Continued.

not prevent the recovery of whatever balance may be actually due. *Horton's Appeal*, 38 Pa., 294.

III. NEGLIGENCE OF CONSIDERATION. 1. While a receipt in full is not conclusive, yet it is *prima facie* evidence of a settlement, and should only be set aside for weighty reasons, especially after the lapse of years. It is competent for a party giving a receipt in full, to testify that he was induced to give the receipt through false statements made to him. *McGrann vs. R. R.*, 111 Pa., 171. *Harris vs. Hay*, *Idem*, 562. 2. Receipts, whether contained in deeds or elsewhere, are not conclusive evidence of the payment of money, but *prima facie* proof only, and are always open to explanation. *Nichols vs. Nichols*, 133 Pa., 438.

IV. NEGLIGENCE TO ADMIT. The law attaches great weight to documentary evidence, as designed to guard against lapses of memory. Among these instruments, there is none on which men rely with more confidence than they do on a receipt. It is not an estoppel, shutting out the truth, but the party who seeks to recover against a receipt must make out his case clearly. *Chapman vs. R. R.*, 7 Phila., 204. *Mitchell vs. Mitchell*, 18 W. N., 440.

V. NEGLIGENCE TO DISPUTE. The receipt of an account rendered, followed by acquiescence, and, above all, by subsequent dealing, should have weight in mercantile transactions little short of an estoppel. *Payne vs. Nicholas*, 2 Phila., 220.

VI. NEGLIGENCE TO OBTAIN. One who leaves goods in a warehouse without obtaining a proper formal warehouse receipt, is wanting in diligence, and will be postponed to a purchaser who buys on the faith of a regular receipt from the keeper of the warehouse. *Troutman vs. Bank*, 12 Phila., 276.

VII. NEGLIGENCE TO PRODUCE. 1. When an account is presented without being accompanied with proper vouchers, the court is justified in disallowing every claim for credit. *Carr's Estate*, 14 Phila., 265. 2. An accountant will not be required in all cases to produce vouchers for his items of credit, but in some

Receipts—Continued.

way the want must be supplied. *Gray's Estate*, 2 Kulp, 45.

3. Receipts are not indispensable, but it is the imperative duty of registers, auditors and the judges of the orphans' courts to require some definite proof to establish the validity of demands against dead men's estates. The oath of the accountant must be received with great caution. *Haply's Estate*, 9 Lancaster Bar, No. 1. *Romig's Appeal*, 84 Pa., 235.

VIII. NEGLECT TO PROVE PAYMENT. A receipt is evidence of payment, but not conclusive proof of the fact. It is susceptible of explanation or direct contradiction. *Megargel vs. Megargel*, 105 Pa., 475.

Receivers.

I. NEGLECT IN APPOINTING. 1. The appointment of a receiver is an act of such importance, that it should be exercised only in a case of extreme necessity. *Monroe vs. Thompson*, 1 Luzerne Law Times, 95. 2. A receiver will not be appointed in a doubtful case. The right to be protected must be clearly established. *Oil Co. vs. Petroleum Co.*, 6 Phila., 521. 3. An injunction and a receiver are resorted to in any case, only to preserve property *in statu quo* pending a contest. In the absence of fraud, and when there is no privity between the parties, the court will not interfere at the instance of a person claiming real property under a legal title, to grant a receiver against parties in possession. The party must first establish his right to the possession of the whole. *Schlecht's Appeal*, 60 Pa., 176.

II. NEGLECT IN INSTITUTING SUIT. A receiver of a corporation cannot bring an action in his own name, unless the legal title to the property has been conveyed to him. Nor can he sue to recover an unpaid subscription to stock without leave of court, and without showing that the collection is necessary to pay the debts. *Wisener vs. Myers*, 42 Pittsburg Journal, 166.

III. NEGLECT IN MANAGING PROPERTY. A receiver who has managed partnership property carelessly and negligently,

Receivers—Continued.

will not be allowed commissions. *Reeves' Appeal*, 3 **Walker**, 199.

IV. NEGLIGENCE IN PAYING OUT MONEY. When a receiver pays out money in good faith upon an order of court, he is protected, although the order was improvidently made. *Palmer vs. Allen*, 26 **W. N.**, 514.

V. NEGLIGENCE TO COMPENSATE. Compensation is allowed to receivers as a reward for the faithful discharge of their trust, and where they are neither prudent nor economical, no commissions will be allowed. *McCay's Appeal*, 1 **Delaware Co.**, 69.

VI. NEGLIGENCE TO INVEST TRUST FUNDS. Where a receiver has funds in his hands which cannot be distributed for a long period, it is his duty to ask the leave of the court to invest them. If he mingles such funds with his own, and deposits them in his own name, and profits by their use in a bank, he will be surcharged for their use. *Schwartz vs. Oil Co.*, 153 **Pa.**, 284.

VII. NEGLIGENCE TO PAY INTEREST ON MONEYS. A receiver is not chargeable with interest when owing to suits he cannot distribute the fund, and where he has not personally used the money. *Wollace's Appeal*, 3 **W. N.**, 469.

Receiver of Taxes.

NEGLECT IN SEARCHES. A *bona fide* purchaser of real estate relying upon a clear certificate of search for registered taxes, furnished by the receiver of taxes, will be protected against any claim for taxes omitted from the certificate. *Philadelphia vs. Glanding*, 26 **W. N.**, 319.

Recognizance.

I. NEGLIGENCE IN FORM. A recognizance is a debt of record entered into or acknowledged before a court or officer having authority to take it. The form is not essential. Though usually in the form of a penal obligation, it is not necessarily

Recognizance—Continued.

so. It need not even be signed by the cognizor, and a short memorandum of it is sufficient. *Riddle's Appeal*, 37 Pa., 181.

II. NEGLECT TO PERFECT. A recognizance of bail in error, with a single surety, is not a *supersedeas*, and the court below may issue execution, notwithstanding the removal of the record. *Rheem vs. Wheel Company*, 33 Pa., 356.

Record.

I. NEGLECT BY ERASURES. If erasures in a record be allowed, the erased writing is simply to be left unread. It is not to be used as a means of construing the writing itself. *Messick vs. Ward*, 1 Grant, 437.

II. NEGLECT IN AMENDING. 1. While a court may so amend its record as to make it conform to the truth, even after the term has expired or writ of error lodged, yet it has no power to make an alteration which is not an amendment, and is without anything on the record to support it. *Levick vs. McCafferty*, 124 Pa., 200. 2. Amendments of the pleadings may be made on or before the trial, and it is error to refuse them, but this right ceases to be absolute and becomes discretionary with the court, where the testimony has been closed and the witnesses dismissed. *Blakeslee vs. Scott*, 27 *Pittsburg Journal*, 200. 3. The power of the court to amend its record, exists by common law and the statute of *jeofails*. *R. R. vs. Bunnell*, 19 *Pittsburg Journal*, 17.

III. NEGLECT IN CERTIFICATE. A record certified by one styling himself "judge of the probate court" of Highland county, in the state of Ohio, is not properly authenticated under the act of congress. *Washabaugh vs. Entriken*, 34 Pa., 74.

IV. NEGLECT IN COPY. The record of an action in a court of common law consists of the writ, declarations, pleas and judgment. An exemplification of the executions is unnecessary. *Erb vs. Scott*, 14 Pa., 20.

V. NEGLECT IN ENTRY. 1. A mistaken entry on the record may be amended. *Comm. vs. Greeley*, 8 Phila., 606.

Record—Continued.

2. The court may correct its own mistakes and the omissions of its clerks in making up the record, after a lapse of time, unless where rights have been acquired which might be injuriously affected by a change of the record. *Law vs. Kennedy*, 24 **Pittsburg Journal**, 112. 3. A court is bound to protect parties from the negligence, mistakes and errors of its officers, and the power should be liberally exercised where the rights of others do not intervene. *Miller's Appeal*, 2 **Pennypacker**, 72. 4. Mistake or fraud, in making up a record, can neither be averred nor proved by parol evidence in a collateral proceeding. The only mode of relief is through the court, whose record is thus erroneous. *Morris vs. Galbraith*, 8 **W.**, 166.

VI. NEGLECT IN EXEMPLIFICATION. Under the act of congress of May 26, 1790, the records and judicial proceedings of every state shall be proved or admitted in any other court of the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form. An exemplification of a record is not properly authenticated, where the certificate is by a justice of the supreme court, when it appeared that there were other justices of that court. It should be by the chief justice. *Van Storch vs. Griffin*, 71 **Pa.**, 240.

VIII. NEGLECT IN PRODUCTION. An office paper taken out of the files by one who has no official connection with it, and produced in court, cannot be given in evidence. It must be produced and authenticated by the officer having it in custody. *Devling vs. Williamson*, 9 **W.**, 311.

VIII. NEGLECT TO FIND. 1. A missing record may be proved by secondary evidence, but its former existence and loss must be first established by competent proof. *Baskin vs. Seechrist*, 6 **Pa.**, 154. 2. After proof of its loss, the contents of a record of judicial proceedings, like any other document, may be proved by secondary evidence. To authorize *memoriter* proof of a lost record, the witness must have read it, or

Record—Continued.

otherwise have actual knowledge of it, and be able to give the substance of its contents. *Richards' Appeal*, 122 Pa., 547.

IX. NEGLECT TO FURNISH FULL COPIES. A statement of claim which does not set out the full record of a suit in another county, upon whose judgment or decree the plaintiff's right to recover is based, is defective, the cases where reference is permitted by act of May 25, 1887, being confined to records in the county where suit is brought. *Campbell vs. Ry. Co.*, 137 Pa., 574.

X. NEGLECT TO PROVE. Official books and papers must be proved, by producing an exemplified copy from the proper office. If the originals are produced, they must be verified by the officer or his clerk who has them in keeping, or some one specially authorized by him. They cannot be verified by one unconnected with the office. *Hockenbury vs. Carlisle*, 1 W. & S., 282.

XI. NEGLECT TO PROTECT PURCHASER OF LAND. A purchaser of land who examines the records, is protected by them as far as they can protect him, but he takes the risk of having the actual state of the title correspond with that which appears of record. *Reck vs. Clapp*, 98 Pa., 581.

XII. NEGLECT IN PUBLISHING. The proceedings in a court of record are matters of public interest and free to all. The decree of a court of equity may be published by one having an interest therein. Such publication may be in the shape of an advertisement. *Lord vs. Lord*, 25 W. N., 436.

XIII. NEGLECT TO RESTORE. The right of a court to restore any of its own records which have been lost, defaced, or stolen, is inherent. The proof furnished must not be by way of affidavit, but by depositions regularly taken. *Covington Road, In re*, 5 C. P. Reporter, 117.

Recorder of Deeds.

I. NEGLECT IN MAKING SEARCHES. 1. The liability of the recorder of deeds for issuing erroneous certificates of search is limited to five years. *Ashton vs. Walton*, 10 W. N., 452.

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2. The recorder of deeds is liable for any loss which may result from a mistake or fraud in searches made under instructions by one of his clerks. He cannot throw the disastrous results of the misplaced confidence of his clerk upon those who loaned their money upon the faith of his official certificate. *Peabody Building Ass'n vs. Houseman*, 89 Pa., 261. 3. The duty of searches is that of the officer and not of parties, and he must see to it that he makes no mistake. If a recorder keeps a general index, and omits to index a deed in it, his certificate makes him liable if an injury results from such omission. *Schell vs. Stein*, 76 Pa., 398. 4. The liability of a recorder of deeds in a false certificate of search only extends to the party taking the certificate, and does not entitle a future purchaser to recover against him. *Comm. vs. Harmer*, 6 Phila., 90. *Girard Ass'n vs. Houseman*, 1 W. N., 116. 5. The recorder is not liable for an alleged error in searches, when the purchaser gives the vendor's name incorrectly. *Comm. vs. Owen*, 2 W. N., 200. 6. A recorder of deeds, giving a certificate that he has searched and can find no mortgage, and charging and receiving the fee therefor, is liable on his bond, if it afterwards appear that a mortgage existed, by which the party obtaining the search was prejudiced. *McCaraher vs. Comm.*, 5 W. & S., 21. 7. In an action for damages against a recorder of deeds for a false certificate of search given by the recorder to the plaintiff, in the absence of fraud, the statute of limitations begins to run from the time when the search was given, and not from the development of the damage. *Owen vs. Saving Fund*, 97 Pa., 47. 8. In an action against a recorder of deeds for negligence in issuing a false certificate of search, the vital question is whether the plaintiff or his agent ordered and paid for the search. If he did, then the recorder is liable; if he did not, it is otherwise. *Peabody Building Ass'n vs. Houseman*, 11 W. N., 193.

II. NEGLECT TO AUTHENTICATE RECORD. The act of June 24, 1885, provides, that when a recorder of deeds has failed, during his official term, to authenticate the record of

Recorder of Deeds—Continued.

any deed or mortgage by adding thereto his certificate, his successor in office shall certify or sign the same. *Pierie vs. Philadelphia*, 139 Pa., 573.

III. NEGLECT TO RECORD DEED. Where a deed is left for record with the recorder, it is his duty to record it. The consequence of his default should not be visited upon the owner, who had done all that the law required in depositing the deed in the office for that purpose. *Stockwell vs. McHenry*, 107 Pa., 245.

Reference.

I. NEGLECT IN FINDINGS OF REFEREE. 1. The findings must state the facts with the certainty, precision and fullness of a special verdict. The act of May 14, 1874, requires the findings of fact and the conclusions of law to be stated separately and distinctly. *Harris vs. Hay*, 111 Pa., 562. 2. The findings of fact by a referee are entitled to the weight of a verdict by a jury. *Long vs. McDermott*, 10 Montgomery Co., 151. 3. The findings of fact by a referee, under the act of May 14, 1874, are conclusive, and cannot be reviewed by the supreme court upon writ of error. *Lyon vs. Kurtz*, 30 *Pittsburg Journal*, 478. 4. The finding of facts by a referee cannot be reversed on appeal, if the evidence fairly warranted it, even though the correctness of his conclusions may be questioned. *McClure vs. Publishing Co.*, 169 Pa., 213. 5. A referee's conclusions of fact have the effect of a verdict, and will not be set aside except for very gross and palpable mistake. *Meredith vs. Thomas*, 5 Lancaster Review, 145. 6. A referee stands in the place of court and jury. His findings, both of law and fact, are conclusive, except plain error or palpable mistake appears. *Stowers vs. Cawley*, 8 Luzerne Register, 76.

II. NEGLECT IN THE REPORT OF REFEREE. 1. The report of a referee should have all the fullness, particularity and precision of a special verdict or case stated. His findings of fact and law should be stated separately. *Scranton vs. McNamara*,

Reference—Continued.

2 Lackawanna Jurist, 68. *Campbell Mfg. Co. vs. Barrett, Idem*, 76. 2. If a referee commits errors of fact, such as would require the court to grant a new trial in the case of a verdict, the report of the referee must be set aside. *Gray vs. Rupp*, 3 York Record, 25.

III. NEGLIGENCE OF REFEREE. 1. A referee sits as a judge and jury, but is not to act also as a witness in the case which he has been sworn to try. He is to find facts, not to furnish them. *Edgerton vs. Williams*, 6 Kulp, 149. 2. Courts must be satisfied affirmatively, that some manifest error has been done, or plain impropriety committed, before they will interfere with an award of referees. *Gardner vs. Lincoln*, 5 Phila., 24. 3. Referees must adhere to the established essentials of actions, otherwise their reports, though established by the court to which they are returned, will be set aside on error. *Gross vs. Zorger*, 3 Y., 521. 4. Where the evidence before the referee is conflicting, his conclusions of fact, based upon his construction of the testimony, and with the advantage of seeing and hearing the witnesses, will not be set aside except for gross and palpable mistake. *Myers vs. Newman*, 7 Kulp, 62. 5. It is the duty of a referee, in making up his report, to keep his findings of fact and law distinct, so that the judgment pronounced may appear to be clearly warranted by the facts found. *Reese vs. Powell*, 4 C. P. Reporter, 70.

IV. NEGLIGENCE OF REFEREES TO ACT. A report of referees is not good, if not made by the persons to whom the case was submitted. If judgment has been entered thereon, it will be reversed for error, though no exceptions have been filed within the time limited by the rules of the inferior court. *Russell vs. Gray*, 6 S. & R., 145.

V. NEGLIGENCE OF NOTICE. If the rule of reference does not state the time and place of meeting, or the notice to be given, the court will set aside the report, unless reasonable notice be shown. *Herman vs. Freeman*, 8 S. & R., 9.

VI. NEGLIGENCE TO FILE EXCEPTIONS. An exception to a referee's report must be filed within the time fixed by rule of

Reference—Continued.

court. If, however, it appears clearly on the face of the award, advantage may be nevertheless taken of it. *Shoemaker vs. Smith*, 2 B., 239.

Register of Wills. See "ADMINISTRATORS," "WILLS."

I. NEGLECT IN GRANTING LETTERS. 1. The register cannot issue letters of administration to a stranger in blood, to the exclusion of any of the kindred willing and competent to undertake the trust, even if such stranger be preferred by a majority of those first entitled. *Able's Estate*, Leg. Gaz. Report, 420. 2. Where a register has granted letters to an improper person, he should cite the parties to appear before him, and not revoke the letters *ex parte*. *Bieber's Appeal*, 11 Pa., 157. 3. Under the act of March 15, 1832, letters testamentary and of administration shall be granted only by the register of the county in which was the family or principal residence of the decedent at the time of his decease; and if the decedent had no such residence in this commonwealth, then by the register of the county where the principal part of the estate of the decedent shall be. *Harberger's Estate*, 8 W. N., 471. 4. In granting letters of administration, the register should not disregard the expressed wishes of the parties preferred by the law and entitled to the estate, even if they be non-residents of the state. If he has appointed a total stranger, he should, upon application of such parties, vacate the letters. *Jones' Appeal*, 10 W. N., 249. 5. The register has power to revoke letters of administration previously granted, for cause. *McCaffrey's Estate*, 4 Phila., 194. 6. The discretion given the register to appoint administrators, is limited to a selection from each class entitled to administer, in order. If the widow of a decedent renounces, the register may select from the children or next of kin, preferring males to females; but the widow or next of kin or both cannot pass by a child or next of kin, competent and willing to administer, and vest it in a stranger. *McClellan's Appeal*, 16 Pa., 110. 7. The register has no discretion in the testator's appointment of an executor. But in the absence of those

Register of Wills—Continued.

to whom the right to administration of an estate is given, the register may exercise a sound discretion in the selection of an administrator. But he cannot pass by the next of kin of the decedent, if competent and desirous to act, and grant letters to a stranger. He cannot revoke letters without cause. *Neal's Estate*, 17 W. N., 192. 8. The register is not at liberty to disregard the clearly expressed wish of the parties preferred by the law and entitled to the estate, even if they be non-residents, and grant letters to a total stranger. *Schanfuss' Estate*, 5 Kulp, 275.

II. NEGLECT TO AWARD ISSUE. 1. Under the act of March 15, 1832, the register is not bound to award an issue whenever it is demanded after the entry of a *caveat*. *Parke's Estate*, 4 Phila., 195. 2. A register of wills is empowered, but not required, to send every contested fact to a trial at law, on the request of any party interested. He need not award an issue, whenever demanded. *Wikoff's Appeal*, 15 Pa., 288.

III. NEGLECT TO CERTIFY DISPUTED QUESTION TO COURT. Where a *caveat* is filed against the admission of a will to probate by parties alleging themselves to be next of kin of the testator, and such kinship is disputed, it is the duty of the register to certify such question of disputed kinship to the orphans' court. If he refuse to do so, and insists on issuing his precept to the common pleas, the latter court by mandamus may forthwith command him to certify the disputed question of kindred to the orphans' court. *Taylor vs. Comm.*, 103 Pa., 96.

IV. NEGLECT TO DEMAND ISSUE. A request for an issue testing the validity of a will should be made formally in writing. *McCarter's Will*, 8 Phila., 595.

V. NEGLECT TO PAY MONEY TO THE STATE. The sureties in a bond given by a register for the faithful execution of his duties, and the payment of all moneys due the state, are not responsible for collateral inheritance taxes, collected, but not paid over by him. By the act of March 22, 1841, a special bond is required of the register for this purpose. *Comm. vs. Toms*, 45 Pa., 408.

Release.

I. NEGLECT IN EXECUTING. 1. In an action against a railroad company to recover damages for personal injuries, the company exhibited a release executed by the plaintiff, who thereupon alleged that he was under the influence of anæsthetics when he executed it, and hence mentally incapacitated. He never offered to return the money received by him, and his conduct constituted an affirmance of the release. *Gibson vs. R. R.*, 164 Pa., 142. 2. Where an attorney at law releases a judgment of his clients as to its lien on certain real estate, without their knowledge or consent, such release is a fraud upon them, and does not discharge the lien of the judgment. *Kirk's Appeal*, 87 Pa., 243. 3. A person who signs a release of liens, falsely representing that he has authority to do so from the owner of the liens, is liable in damages to a person purchasing the property on the faith of the release. *Lane vs. Corr*, 156 Pa., 250. 4. The next friend of an infant plaintiff in a judgment for personal injuries, cannot release or compromise the claim of the infant, especially after it has been prosecuted to judgment. *O'Donnell vs. Broad*, 2 Pa. Dist., 84.

II. NEGLECT IN SIGNING. 1. Circumstances of extreme necessity and distress of a party, although unaccompanied by any direct restraint or duress, may, by overcoming his free agency, justify the setting aside of a release signed by him through fraudulent advantage or imposition attendant upon it. Where a person has executed a release under seal, his uncorroborated testimony is not sufficient to impeach it. *Detwiler vs. Graham*, 17 Phila., 300. *Ross vs. Ry. Co.*, *Idem*, 361. 2. Where a party, who had been injured through the negligence of another, signed a release of his claim for damages by reason of false representations made by a surgeon as to the extent of the physical damage sustained, which representations were made at the same time an officer of the defendant company was urging a settlement, he may ignore the release and sue for damages. *People's Natural Gas Co. vs. Millbury*, 2 Monaghan, 145.

III. NEGLECT TO ENTER A NOLLE PROSEQUI. The plaintiff

Release—Continued.

is bound to sue all parties in a joint contract, and to declare upon it as the contract of all ; yet, if he desires to release one of the parties, it can properly be done by entering a *nolle prosequi* either before or after judgment. *Burke vs. Noble*, 48 Pa., 175.

IV. NEGLECT TO EXECUTE. A promise to release a debt, if not founded upon a consideration, is *nudum pactum*. *McNutt vs. Loney*, 153 Pa., 281.

V. NEGLECT TO SEAL. 1. A release of a debt, not under seal, requires proof of a consideration to make it valid and binding on the releasor. A seal implies consideration. *Kidder vs. Kidder*, 33 Pa., 268. 2. A release under seal imparts a sufficient consideration ; but if without seal, and no consideration is expressed or proved, it must be regarded without consideration, and insufficient. *Navigation Co. vs. Harris*, 5 W. & S., 28.

Rent. See "LANDLORD AND TENANT," "LEASE," "DISTRESS."

I. NEGLECT IN DISTRAINING. 1. Goods entrusted to an agent to be sold on commission are not liable to distress for rent due by the agent. The rule of the common law, that the goods of a stranger on demised premises are subject to the distress of the landlord, has yielded to the growing necessities of trade and business. *Karns vs. McKinney*, 74 Pa., 390. *Howe Sewing Machine Co. vs. Sloan*, 87 Pa., 438. 2. The property of a stranger found on demised premises, left for no purpose of trade, or other purpose requiring protection, as a matter of public policy, is liable to distress for rent. *Kleber vs. Ward*, 88 Pa., 93. 3. Under the act of May 13, 1876, exempting pianos, melodeons and organs, leased or hired, from levy or sale on execution or distress for rent, the notice required by the act must be given to the landlord when the leased instrument is placed upon the premises, or, at latest, before his right to distrain has accrued. *McGeary vs. Mellor*, 87 Pa., 461.

II. NEGLECT IN NOTICE OF CLAIM. Notice of a landlord's claim for rent is sufficient, if given at any time before the

Rent—Continued.

return of the writ of execution and payment of the money. *Borlin vs. Comm.*, 110 Pa., 454.

III. NEGLECT OF TENANT IN COMMON TO PAY. 1. A tenant in common cannot recover in *assumpsit* against his co-tenant for the use and occupation of the common property, without an express contract to pay rent. *Supplee vs. Yerkes*, 1 Chester Co, 576. 2. One of two tenants in common incurs no implied liability to the other to pay for the use and occupation of land, merely because he has possession of it. He can be sued by his co-tenant only on an express promise. *Underwood's Estate*, 19 Phila., 100.

IV. NEGLECT TO CLAIM. After the sale by the sheriff of personal property, and after he has lost control of the goods, it is too late for a landlord to notify him of his claim for arrears of rent. *Work's Appeal*, 92 Pa., 258. *Herr vs. Buckley*, 14 Lancaster Bar, 135.

V. NEGLECT TO COLLECT. A trustee is not liable for loss of rent, if he has used reasonable diligence in attempting to collect it. *Patterson's Estate*, 35 Pittsburg Journal, 192.

VI. NEGLECT TO DEMAND. When the landlord has habitually waived default in the payment of rent, he will not be permitted to exercise his option of forfeiture, as set forth in the lease, upon a single day's default, without notice. A landlord should make a formal demand for the rent upon the premises. *Halderman vs. Sampter*, 6 Luzerne Law Times, N. S., 139. 2 Delaware Co., 106.

VII. NEGLECT TO OWE. 1. An eviction of a tenant by a landlord does not forfeit rent already accrued. *Gallagher's Estate*, 37 Pittsburg Journal, 306. 2. A tenant cannot escape liability for the rent of another term, by giving notice of his intention to leave at the end of the year, and then not going. *Graham vs. Dempsey*, 169 Pa., 460. 3. A tenant under a lease for years, is liable for the rent stipulated accruing subsequently to the destruction of the premises by fire, and this liability is not affected by the failure or refusal of the landlord

Rent—Continued.

to rebuild. *Mannerback vs. Keppleman*, 2 Woodward's Decisions, 137.

VIII. NEGLECT TO PAY. 1. The use and occupation of premises raises an implied promise to pay rent. The relationship and dealings of parties which rebut the presumption of an implied promise to pay for personal services or boarding, does not apply to the case of a claim for rent. *Spackman's Appeal*, 2 Chester Co., 195. 2. A tenant who alleges that his landlord has interfered with the beneficial enjoyment of the property, but who remains in possession, must pay the rent therefor according to the lease. *Sutton vs. Foulke*, 19 Phila., 419.

Repairs.

I. NEGLECT OF WORKMEN. When an article is kept for repairs at a workshop, the duty of exercising ordinary care over it is incidental to the contract to repair, and *assumpsit* will lie upon failure to perform this duty. The failure to employ a night watchman at a machine shop does not show want of ordinary care over articles left there for repairs. *Zell vs. Dunkel*, 10 Lancaster Review, 212.

II. NEGLECT TO MAKE. 1. If repairs are absolutely necessary to preserve the fee from waste, ordinary wear excepted, and are made by a life tenant after notice to the remainderman, who refuses or neglects to make them, the cost may be recovered from the latter. *Baker vs. Erbin*, 1 Delaware Co., 136. 2. A tenant in common is liable to his co-tenant for repairs that are absolutely necessary to buildings on the premises. *Beatty vs. Bordwell*, 12 Lancaster Bar, 50. 27 Pittsburg Journal, 273. 3. It is no defence to a landlord's claim for rent, that the premises were so damaged by fire as to be untenable, and that the landlord made no effort to restore them to their primary condition. The law implies no such duty, unless imposed upon him by the lease. The lessee must in such case pay the rent, even though the building be consumed. The law is different if the premises leased be but

Repairs—Continued.

a part of the whole building. *Phillipps vs. Epp*, 9 Lancaster Review, 197. 4. The refusal or neglect of a landlord to make repairs, does not warrant the tenant in refusing to pay rent. *Prescott vs. Oberstatter*, 25 **Pittsburg Journal**, 146. 5. A life tenant is bound to keep up repairs and pay the taxes and interest on the mortgages on the property. *Stoop's Estate*, 31 **Pittsburg Journal**, 34. 6. In the absence of any agreement as to repairs, a tenant is bound to make fair and ordinary repairs, so as to prevent decay of the premises, but is not required to make substantial and permanent ones, such as new roofing, nor to make general repairs, nor restore the buildings if burnt down or become ruinous by accident, without any default on his part. *Weber vs. Moore*, 3 Lancaster Bar, No. 15.

Replevin.

I. NEGLECT IN COMMINGLING GOODS. It is not a bar to an action of replevin, that the plaintiff's goods have been commingled with like goods of the defendant by the wrongful act of a third party, unless perhaps where the character of the goods is so essentially changed by the mixture that one *aliquot* part would not be the equivalent for another. *Wilkinson vs. Stewart*, 85 Pa., 255.

II. NEGLECT IN EXECUTING WRIT. In executing a writ of replevin, a sheriff's officer may break the outer door of the house in which the goods are located, or enter the house through a window. He acts, however, at his peril, for if he does not find the goods, he is a trespasser. *Jones vs. Herron*, 31 W. N., 263.

III. NEGLECT TO RETURN THE GOODS. A replevin bond is conditioned to make return of the goods, if a return shall be awarded. If the sheriff does not find the goods upon the writ *de retorno habendo* in the possession of the plaintiff, he returns "*eloigned*." A claim property bond is security for the damages which may be recovered, which must always be in money. The production of the same goods, although depre-

Reserved Points—Continued.

Pa., 223. *Fayette Borough vs. Higgins*, 112 **Pa.**, 1. 2. Where a point of law has been reserved at the trial, but neither the point reserved nor the facts upon which it arose were stated on the record, it is error for the court to subsequently enter judgment on the point, *non obstante veredicto*. *Elkins vs. Ins. Co.*, 3 **Pennypacker**, 367. 3. Where a question of law is reserved by the lower court, it must be spread upon the record, otherwise the record is defective. *Johnston vs. Board of Publication*, 34 **Pittsburg Journal**, 164. 4. Where the trial judge reserves a question of law, the record must show the specific facts on which the law is so reserved. *Keifer vs. Eldred Township*, 110 **Pa.**, 1. *Miller vs. Bedford*, 86 **Pa.**, 454. 5. An instruction to find a verdict for plaintiff, subject to the opinion of the court on legal points reserved, is an insufficient reservation of a question of law. The legal questions reserved should be placed upon the record either by a special verdict, or by a distinct reservation stating the questions of law held under advisement. *Moore vs. Copley*, 165 **Pa.**, 294.

VII. NEGLECT TO EXCEPT TO JUDGMENT THEREON. 1. An objection that a question of law was not properly reserved, must be made at the time of the reservation. *Headley vs. Renner*, 129 **Pa.**, 542. 2. It is necessary for the correction in the supreme court of an error by the court below in entering judgment on a reserved point, that an exception should be taken at the time of entering the judgment. *Merkel vs. Berks Co.*, 81 **Pa.**, 506. *Northumberland Bank vs. Eyer*, 60 **Pa.**, 430. 3. No exception being taken to a point reserved, the presumption was that it was assented to as a true statement of the facts. If a judge, in a reserved point, states facts without agreement, the objection must be made and exceptions taken at the time. *Penna. Ins. Co. vs. Phœnix Ins. Co.*, 71 **Pa.**, 31. 4. Where no exception is taken to the reservation by the court, it is assumed that all parties acquiesced in the point reserved as a true statement of the facts in the case. It is necessary for the correction by the supreme court of an error in the court below in entering judgment on a reserved point,

Reserved Points—Continued.

that an exception should be taken at the time of entering the judgment. *Santry vs. R. R.*, 4 Montgomery Co., 144. *Lower Providence Ins. Ass'n vs. Weikel, Idem*, 55.

VIII. NEGLECT TO FURNISH WRITTEN OPINION. 1. In the reservation of questions, they can only be of pure questions of law ; and the facts should be agreed by the parties, or found by the jury. The facts should be stated on the record. Courts cannot reserve questions of fact, though they may necessarily be mixed with questions of law. Wherever there is a judgment on reserved points, it is advisable that there should be always a written opinion to indicate to the court of error the grounds of the judgment. It is a loose practice, to bring up a case to the supreme court by a bill of exceptions to the judgment and the judge's notes of trial filed. *Wilde vs. Trainor*, 59 Pa., 439. 2. When a judgment is entered in the court below on a reserved point, it should always be accompanied with a written opinion. *Pierce vs. Livingston*, 80 Pa., 99.

IX. NEGLECT TO SET OUT THE EVIDENCE. 1. Where a point is reserved for the opinion of the court, on the trial of a case, it must set out facts as found by the jury or agreed upon by the parties. A judge cannot draw conclusions of fact from the evidence. Hence the reserved question must be one of law, and cannot be a mixed question of law and fact. *Comm. vs. McDowell*, 86 Pa., 377. 2. Upon a reserved point, whether there is evidence to go to a jury, the bill of exceptions should set out the evidence. It is not sufficient that the judge in his opinion includes the evidence. *Leach vs. Ansbacher*, 19 *Pittsburg Journal*, 6.

X. NEGLECT TO SPECIFY. 1. It is not a good reservation of a point to reserve it on all the evidence. Every reservation should place distinctly on the record what the point which is reserved is, and the state of facts upon which it arises. *Ferguson vs. Wright*, 61 Pa., 258. 2. Every reservation of a question should place distinctly on the record what the point reserved is, and the facts out of which it arises ; and if not found by the jury, the facts should be agreed upon by the parties. These

Reserved Points—Continued.

essentials are not sufficiently shown by the notes of trial, which are no part of the record. *Inquirer Publishing Co. vs. Rice*, 106 Pa., 625. 3. In every case where a general verdict is given subject to a point reserved, the question of law reserved must be stated, and the facts on which it arises must be either admitted on the record or found by the jury. *Wilson vs. The Tuscarora*, 3 *Pittsburg Journal*, 381.

Restitution.

I. NEGLECT IN APPLICATION FOR WRIT OF. Where on a judgment in the court below, execution issued, upon which the amount was obtained by the sheriff, which judgment was reversed by the supreme court, and a *procedendo* awarded, the writ of restitution should be applied for in the latter court before the record is removed. *Richardson vs. Coal & Iron Co.*, 29 *Pittsburg Journal*, 388. 14 *Lancaster Bar*, 34.

II. NEGLECT TO ORDER. A court below cannot engraft on a decree of the supreme court an order of restitution not contained in said decree. If restitution be ordered, it is a constituent part of the judgment, but if not found therein, it cannot be made a part thereof by the lower court. *Hughes' Appeal*, 90 Pa., 60.

Revenue Stamps.

NEGLECT TO AFFIX. A will is not invalid because no United States revenue stamp was placed upon it when executed. The register should affix the stamp before he issues letters testamentary. *Werstler vs. Custer*, 46 Pa., 502.

Rewards.

NEGLECT TO EARN. In an action for a reward offered for the arrest and conviction of a criminal, the question is not whether the criminal was convicted on the plaintiff's testimony, but whether the plaintiff was mainly instrumental in securing the arrest and conviction. *Rinehart vs. Lancaster City*, 18 W. N., 364.

Right of Way.

NEGLECT TO CLAIM. Twenty-one years' occupation of land, adverse to a right of way, and inconsistent with it, bars the right. *Yeakle vs. Nace*, 2 Wh., 123.

Riots.

I. NEGLECT OF SHERIFF. If a sheriff during a riot fails to exercise, in any way, his extensive powers to protect property, preserve peace, and restore order, he is guilty of a misdemeanor, and liable to indictment. He may call out every able-bodied man, if necessary. *Riots of 1844, In re*, 2 Clark, 135, 275.

II. NEGLECT TO SUPPRESS. 1. For failure to suppress a riot, a city has been held not to be liable, nor for the destruction caused by a mob, except by statutory enactment, as is applicable to Philadelphia by the act of May 31, 1841. *Freeman vs. Philadelphia*, 7 W. N., 45. 2. Where a breaker at a coal mine was set on fire at night by a party of men, who fired a number of shots, drove the watchman away and then burned the breaker, it was a riot. *Lycoming Ins. Co. vs. Schwenk*, 95 Pa., 89. 3. If a municipality can act at all in the suppression of riots, it must be through its justices, constables and policemen, and if they neglect their duty and refuse to act, the municipality is powerless. For damages resulting from the conduct of a mob, neither city nor county, borough nor township, can be held except by special statute. *Norristown vs. Fitzpatrick*, 94 Pa., 125. 4. By the acts of May 31, 1841, and March 20, 1849, in all cases in Philadelphia and Allegheny counties, where any property is destroyed in consequence of any mob or riot, the owner may recover damages from the county for the destruction thereof. Damages will not be given for consequential injuries, such as the suspension of business. Nor will interest be allowed on the estimated loss. *Weir vs. Allegheny*, 95 Pa., 413.

Riparian Rights. See "DAMS."

I. NEGLECT BY DESTRUCTION OF DAM. In an action of trespass for destroying a mill-dam, the plaintiff may give evi-

Riparian Rights—Continued.

dence of loss sustained by him by reason of the stoppage of his mills. *Spigelmoyer vs. Walter* 3 W. & S., 540.

II. NEGLECT BY DIGGING NEW CHANNELS. The owner of upper lands may improve his lands, although thereby the volume of water discharged on inferior lands is increased, but he cannot make or dig new channels. *Kauffman vs. Griesemer*, 26 Pa., 407.

III. NEGLECT BY DIVERTING WATER. 1. A party breaking the bank of a water course, and diverting the water from a mill, cannot justify the continuance of the nuisance, by denying his right to enter the land of a stranger to abate the nuisance, on the ground that he would be liable as a trespasser. *Smith vs. Elliott*, 9 Pa., 345. *Miller vs. Miller*, *Idem*, 74 *Wheatley vs. Chrisman*, 24 Pa., 298. 2. Though the owner of ground and water power may grant the privilege to a party of the use of a portion of such water, yet it does not follow that the user may assign his right to a third party. *Washabaugh vs. Oyster*, 18 Pa., 497. 3. Where a subterranean flow of water becomes a well-defined stream, the owner of the land above shall not divert it, to the injury of a party below. But where a spring depends upon percolations through the land above, and in the use of the land for mining it becomes diverted, such owner, unless negligent, is not liable. *Wheatley vs. Baugh*, 25 Pa., 528.

IV. NEGLECT, BY ERECTING DAM. 1. One who builds a dam in a navigable river is entitled to the same protection against an inferior proprietor, who would back the water upon his wheel, as if his dam was on a stream not navigable. *Bigler vs. Antes*, 21 Pa., 288. *Kemmerer vs. Edelman*, 23 Pa., 143. 2. An erection in a river, which is a highway, is *prima facie* indictable, according to the common law, and the license to erect it must be shown. *Comm. vs. Church*, 1 Pa., 105. *Riddle vs. Dixon*, 2 Pa., 372. *Detweiler vs. Groff*, 10 Pa., 376. 3. The injury resulting from flooding the plaintiff's land must be proved to have been produced by a specific cause; to lay the flooding as a consequence, without

Riparian Rights—Continued.

more, would be too general. *Good vs. Mylin*, 8 Pa., 51.
4. The law of the erection of a dam is, that it shall not obstruct or impede the navigation of the stream. *Hall vs. Lacey*, 3 Grant, 264. *Mertz vs. Dorney*, 25 Pa., 519. 5. In an action of damages for flooding the land of plaintiff, a witness cannot testify as to the right to swell the water, though he may as to the *quantum* of damages. *Reagan vs. Grim*, 13 Pa., 508. *Bovard vs. Christy*, 14 Pa., 267. *Morris vs. McNamee*, 17 Pa., 173.

V. NEGLECT BY RAISING A DAM. If the owner of land had notice of the canal company's intention to raise a dam in a stream running through his land, which it had a right to do, he was unwise in making improvements which would be affected by such act. *Schuylkill Co. vs. Farr*, 4 W. & S., 362.

VI. NEGLECT, BY WASTE OF WATER. Every riparian owner is entitled to the flow of water through his land, although the owner of a mill below may be in some manner injured thereby. He must, however, avoid an improper or malicious use of the water. *Hoy vs. Sterrett*, 2 W., 327. *Whaler vs. Ahl*, 29 Pa., 98. *Beidelman vs. Foulke*, 5 W., 308. *McKellip vs. McIlhenny*, 4 W., 317. *Bacon vs. Arthur*, 4 Idem, 437.

VII. NEGLECT IN ERECTING DAM. 1. The general rule is that every man has a right to the flow of water in its natural channel through his land. But in using it, he must work no material injury or annoyance to his neighbor. The owner of a dam must use necessary precautions against expected freshets, but is not liable for damage from extraordinary floods. The concurrence of negligence with the act of Providence in floods and storms is requisite to fix the defendant with liability. *Bell vs. McClintock*, 9 W., 119. *Union Canal Co. vs. Landis*, Idem, 228. *McCoy vs. Danley*, 20 Pa., 89. *Roush vs. Walter*, 10 W., 86. 2. If a person entitled to erect a dam carries it to an improper height, the person injured may reduce the dam to the proper height, but may not demolish it. The party abating a nuisance can only remove so much as constitutes the nuisance. *Dyer vs. Depui*, 5 Wh., 597.

Riparian Rights—Continued.

3. Where one has a right to erect a dam in a public stream, so as not to obstruct its navigation, persons passing such dam must use ordinary care and skill. If this be done, and loss ensue through the obstruction, the one erecting the dam is liable in damages. *Plumer vs. Alexander*, 12 Pa., 81.

VIII. NEGLIGENCE OF OWNER OF DRIFTWOOD. Property carried adrift continues to be the property of him who owned it at the time of the flood. When stranded, he has the right to enter on the land and remove it; but he may abandon it, if he please, without incurring responsibility for injury done by it, unless the drifting resulted from his negligence. The owner of the land on which property is stranded has no lien on the drifted property. If, after notice to him, the owner of the wood neglect or refuse to remove it, the owner of the land may thrust it back into the stream, but cannot appropriate it to his own use. *Forster vs. Bridge Co.*, 16 Pa., 393.

IX. NEGLIGENCE TO REPAIR DAM. To the grant of the right to back the water by a dam, on the land of a grantor, there is incident the right to repair such dam. *Frailey vs. Waters*, 7 Pa., 221.

Rivers.

I. NEGLIGENCE IN NAVIGATING. 1. It is a well-known law of navigation that vessels having full control of their motive power shall give way to those that are less manageable. Hence, a steamboat must give way to coal boats if the steamboat be in motion. *Baker vs. The Hibernia*, 5 Clark, 48. 2. A vessel may hold its course in a navigable stream without regard to a fisherman's net, if the master act without wantonness or malice, and do no unnecessary damage. *Cobb vs. Bennett*, 75 Pa., 326. 3. On a river declared a public highway, all persons have a right to navigate it with boats or ships, in such a way as they please, provided they take proper care that no injury be done to the persons or property of others. If an injury occur from events over which the master of a boat has no control, and he displayed care in the management of his

Rivers—Continued.

vessel, he will not be held liable. *Comm. vs. Bilderback*, 2 Parsons, 452.

II. NEGLECT IN OBSTRUCTING. 1. A mandatory injunction at the suit of a city against a steel company to compel the removal of slag and cinders deposited in a navigable river by the company, will not be granted where the evidence is conflicting as to whether the deposit caused the flooding of the streets. *Scranton vs. Steel Co.*, 154 Pa., 171. 2. Where, under the authority of an act of assembly, a bank and stone wall are erected to prevent an overflow of water from a river, damages cannot be recovered for an injury to a fishery occasioned thereby. Such damages are merely consequential. *Tinicum Fishing Co. vs. Carter*, 90 Pa., 85. 3. Between high and low water, the owner of the soil may use the river for his private purposes if he does not interfere with the rights of the public. *Zug vs. Comm.*, 70 Pa., 138.

III. NEGLECT IN WITHDRAWING WATERS. The rights of the city of Philadelphia to draw water from the Schuylkill river for the purposes of manufacturing, or of baths, or for propelling power, are subordinate to the right of navigation. *Philadelphia vs. Gilmartin*, 71 Pa., 141.

IV. NEGLECT OF BOOM COMPANY. Where logs escape from a boom from the unavoidable dangers of the river, or through inevitable accident, without evidence of negligence, a boom company will not be held liable. *Brown vs. Boom Co.*, 109 Pa., 57.

V. NEGLECT OF RIPARIAN OWNERS. 1. Between high and low-water mark the riparian owner cannot occupy to the prejudice of navigation, nor place obstructions on the shore without express authority from the state. *Wainwright vs. McCullough*, 63 Pa., 66. 2. The act of March 25, 1848, enacts that the district commissioners, upon complaint of any person owning river fronts liable to be damaged by overflow, that the banks are out of repair, give notice to the owner to repair the same in forty-eight hours; if he neglects, the com-

Rivers—Continued.

missioners shall repair the bank and lien the property for the cost. *Philadelphia vs. Scott*, 81 Pa., 80.

VI. NEGLECT TO REMOVE OBSTRUCTIONS. 1. It is the duty of a city to keep the navigable waters in front of it free from obstructions. *Snyder vs. Philadelphia*, 1 W. N., 175. *City vs. Edwards*, 2 W. N., 182. 2. A city is not liable for an injury to a vessel resulting from the presence of a rock, part of the natural bed of the river opposite its wharves. It would be dangerous to carry the definition of an obstruction, as the term is used in the act of May 2, 1854, to the natural bottom of the river, especially where no notice has been given to the city authorities of its existence. *Snyder vs. Philadelphia*, 78 Pa., 23.

VII. NEGLECT TO REMOVE WRECKS. The owner of a vessel which has been sunk in navigable waters, and abandoned by him, is under no obligation to remove the vessel, and is not liable for the injuries it may cause navigators. If, however, he retains possession or control, he must exercise ordinary diligence and care in removing it. *Winpenny vs. Philadelphia*, 65 Pa., 139.

Roads.

I. NEGLECT IN CONSTRUCTION. 1. To apply the liability of a township for non-repair to a case of original construction is not to be thought of. It is not the duty of a poor township to dig down steep hillsides and blast miles of rock in order to build a double-track wagon road. In the original construction of roads and bridges, the townships must be governed by their means. In the more mountainous parts of the state, roads are constructed for miles along hillsides, often of solid rock, where it is impossible to open the road to a width greater than a single wagon track, except for turn-outs at intervals. It is contributory negligence for the driver of a wagon in such case to attempt to pass another vehicle on the causeway. *Perry Township vs. John*, 79 Pa., 412. 2. In closely built up portions of a city, it is the duty of the authorities to keep the entire

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street in a safe condition, but this is not the rule as regards country roads. It is sufficient, if a portion of the width of the road is kept in smooth condition and safe and convenient for travel. There are ditches, bridges, rocks, stumps and other elements of danger, outside of the traveled portion. *Monongahela City vs. Fischer*, 111 Pa., 9. 3. In an action against a turnpike road company to recover damages for personal injuries, it is proper to submit the case to the jury where there is evidence of the existence of an embankment at a point where the road was depressed several feet on the side of the macadamized portion. *Kreider vs. Turnpike Co.*, 162 Pa., 537.

II. NEGLECT IN DRAINING. Where township authorities drain a public road by artificial gutters on each side of the road, joined by a culvert emptying the entire drainage upon the land of an individual, by which his land was damaged, the township is liable to him. *Huddleston vs. West Bellevue Borough*, 111 Pa., 110.

III. NEGLECT IN LAYING OUT. In the planning of a public road, viewers should avoid a location crossing a railroad track at grade, if it can reasonably be avoided. If they adopt such crossing at grade, and the court of quarter sessions, on exceptions to the report, find that the grade crossing could not be reasonably avoided, and confirm the viewers' report, the supreme court, on *certiorari*, cannot go into the merits of the case. *Palmer Township Road, In re*, 109 Pa., 274.

IV. NEGLECT IN LAYING PIPES. A township is not an insurer against all defects or obstructions, latent as well as patent, in the public highways. Where the owner of adjacent property laid a gas-pipe in a careless way under a highway, resulting in an explosion of gas and injury to a passer-by, the township is not liable for the injury, where the authorities had no knowledge of the existence of the pipe at the time of the accident. *Otto Township vs. Wolf*, 106 Pa., 608.

V. NEGLECT IN LOCATING. 1. A public road cannot be laid out to or from the dwelling house of an individual solely for his private accommodation. *Britain Road, In re*, 1

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Chester Co., 396. 2. If a road cannot be opened without removing a dwelling house or an important public building, like a schoolhouse, the necessity for such location of it should appear affirmatively. *Pottsgrove Township Road*, 4 Montgomery Co., 114. 3. Condemnation of private property for a private road can be justified only on the plea of strict necessity. The owner of the land must have personal notice of the time and place of meeting of the viewers, and the time and place fixed for the assessment of damages. *Redstone Township Road, In re*, 112 Pa., 183.

VI. NEGLECT IN OBSTRUCTING. 1. At common law any obstruction which unnecessarily impedes the lawful use of a highway by the public is a nuisance, and indictable as such. *Comm. vs. Allen*, 148 Pa., 358. 2. On an indictment for a public nuisance in maintaining a fence upon a public highway, the defence that the fence is upon the defendant's own land is inadmissible. A traveled road, as laid out by the township authorities, cannot be interfered with. If the road was not properly located, there is another way to correct the error. *Comm. vs. Dicken*, 145 Pa., 453. 3. An owner of land abutting on a public highway has a right to use a portion of the highway for certain purposes for a temporary period and in a reasonable manner. This right is an absolute one, not subservient to the rights of the traveling public. The lawful exercise of such right, without negligence, imposes no liability to pay for damages resulting therefrom to a traveler upon the highway. *Piollet vs. Simmers*, 106 Pa., 95.

VII. NEGLECT IN TAXING FOR CONSTRUCTION. In cities and large towns, the per-foot mode of assessment reaches a just apportionment in most cases. It is conceded, that the rule of charging benefits by frontage is a fair one. To apply this rule to the country and to farm lands would lead to inequality and injustice. To charge the cost of a macadamized highway upon the neighboring farms at a fixed sum per acre would be onerous and unreasonable, and lead to imposition for the advantage of the public at large and of individuals who pay nothing.

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The legislature erred in fixing such a burden upon the lands adjacent to a highway, and such a law is against the clear intent and spirit of the bill of rights. *Washington Avenue*, 69 Pa., 362.

VIII. NEGLIGENCE IN TRAVERSING. 1. One who knows of the dangerous condition of a particular portion of a public highway, and could have avoided it by driving on the opposite side, is guilty of contributory negligence in driving over the defective portion. *Brendlinger vs. New Hanover*, 148 Pa., 93. 7 Montgomery Co., 169. 2. A traveler's right to the use of the highway is subordinate to the right of the public authorities to make reasonable repairs. A traveler is bound to exercise ordinary care and prudence, and if a section of the road is obviously dangerous, he should avoid it. *Crescent vs. Anderson*, 4 Lancaster Review, 119. 3. One who knows of a defect in a highway, and voluntarily undertakes to test it when it could be avoided, cannot recover against a municipality for loss incurred through such defect. *Crescent Township vs. Anderson*, 114 Pa., 643. 4. While a pedestrian may walk in a driveway if he pleases, he does so at his peril, and if injured on a dark night by being struck by a moving wagon, he is guilty of contributory negligence. *Ely vs. Shenk*, 11 Lancaster Review, 337. 5. One who attempts to use a public road, knowing it to be unsafe, and not choosing to avoid known defects, which he could have avoided by taking another road, cannot recover against a township for an injury resulting from such defects. *Hill vs. Tionesta*, 146 Pa., 11. *Lynch vs. Erie*, 151 Pa., 380. 6. Where a traveler at night on a country road, assumes a known risk in driving near the edge of an embankment, with the location of which he is familiar, and is injured thereby, he is not entitled to recover damages from the township. *Mueller vs. Ross Township*, 152 Pa., 399. 7. When plaintiff knew that a public road was in a dangerous condition, and drove over it, and was hurt by the overturning of his wagon, he was guilty of contributory negligence. *Walters*

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vs. *Wayne*, 16 Pa. County, 612. *Winner vs. Oakland*, 158 Pa., 405.

IX. NEGLIGENCE IN USING. A steam engine, as a means of locomotion along a public highway, is not necessarily a nuisance, and a party is not liable for an injury resulting from the use of such engine whereby a horse was frightened, if it was exercised with reasonable care. *Baker vs. Lease*, 2 Chester Co., 377.

X. NEGLIGENCE OF CONTRACTOR. The act of assembly, directing the supervisor of a township to give to the lowest and best bidder the contract for making and repairing the roads therein, does not relieve the township of liability for an accident caused by the unsafe condition of the roads. Contractors are usually required to give bond for the proper performance of their contracts, and also to save and keep harmless the township from damages consequent upon accidents resulting from neglect in keeping the roads in perfect order. *Mahanoy Township vs. Scholly*, 84 Pa., 136.

XI. NEGLIGENCE OF NOTICE OF MEETING OF VIEWERS. No notice need be given the owners of land of the time when the viewers will meet to lay out a road passing through it, but the viewers ought, in passing through improved land, to call the person living on the farm. *App's Road, In re*, 17 S. & R., 388.

XII. NEGLIGENCE OF RIGHT OF WAY. The principle, that a footman or horseman cannot compel a teamster, who has a heavy load, to turn out of the beaten track of the road, if there be sufficient room for the former to pass, is applicable to the case of a light wagon or carriage with a heavy draught. *Beach vs. Parmeter*, 23 Pa., 136.

XIII. NEGLIGENCE OF SUPERVISORS. 1. Supervisors have certain duties to perform, for the neglect of which they are indictable. It is their duty to open public roads laid out according to law, and to keep them in repair. It is their duty to remove obstructions in a public highway, and to abate any dangerous place in the road, and guard any excavation. *Comm. vs. Cassatt*, 3 Montgomery Co., 179. 2. Township officers are

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not personally liable for acts done honestly in the exercise of the discretion given them by law, though it be exercised so mistakenly as to work an injury to private property or individuals, but they are liable, if they act maliciously and wantonly. *Yealy vs. Fink*, 43 Pa., 212.

XIV. NEGLECT OF VIEWERS. 1. Clerical errors in a report of viewers appointed to lay out a road, should be referred to the viewers by the court before confirmation. *Boyer's Road*, 37 Pa., 257. 2. If an order of viewers be issued without the seal of the court, or the signature of the prothonotary, it is a defect, which the court cannot remedy after the report of the viewers is returned into the office. Great latitude, however, is allowed to viewers in locating a road. *Bryson's Road*, 2 P. & W., 207. 3. A report of road viewers must be made at the next term of court after the order is taken out and presented for approval. Where the report was filed during the term in which the order was granted, the approval of the court at the third term thereafter, and subsequent confirmation, was irregular and void. *Chartiers Township Road*, 48 Pa., 314. 4. Where it is not stated in the report of viewers that they were all sworn, the proceedings will be quashed. *Morrison's Road, In re*, 3 S. & R., 210.

XV. NEGLECT TO AVOID KNOWN OBSTRUCTIONS. 1. Country roads are not in all places prepared for travel for the full width of the highway; a traveler's duty ordinarily is to follow the prepared track, if that is in good condition; if he knowingly deviates from it, without cause, and suffers an injury, the township is, in general, not liable for the damages. *Crescent Township vs. Anderson*, 114 Pa., 643. 2. A person who knows a defect on a highway and voluntarily undertakes to test it when it could be avoided, cannot recover against the municipal authorities for loss incurred through such defect. The question of contributory negligence should not be submitted to a jury. *Hill vs. Tionesta*, 29 W. N., 390. 3. A person who knows a defect on a highway and voluntarily undertakes to test it when it could be avoided, cannot recover

Roads—Continued.

against the municipal authorities for losses incurred through such defect. It may be, however; that the taking of another road, even if perfectly safe, would have involved so much of delay, distance or other inconvenience, as would justify a traveler in keeping on the defective highway. This is a question for a jury. The general principle is, that if he had warning that the road was dangerous, and knew that by reasonable precaution the danger could be avoided, prudence required that such precaution should be taken. *Fork's Township vs. King*, 84 Pa., 230. 4. A man is as much bound to avoid a known danger on a public highway as anywhere else. Obstructions to travel are always liable to exist, and a party placing them on a road or allowing them to remain there may be liable in damages to the parties injured thereby, where they have used reasonable care to avoid such injury; but where a person knowing of a defect on a highway, undertakes to test it, when it could have been avoided, he is guilty of contributory negligence. *Pittsburg Southern R. R. vs. Taylor*, 104 Pa., 314.

XVI. NEGLECT TO CONTINUE A ROAD ORDER. The refusal of the court of quarter sessions to continue a road order is discretionary, and not reviewable in the supreme court. *Duff's Road*, 66 Pa., 459.

XVII. NEGLECT TO ERECT GUARDS FOR PROTECTION. 1. Where a road runs along a dangerous embankment, it is the duty of the township supervisors either to erect a fence or suitable guards and to maintain them in good repair, so as to render the road safe for travel. *Aston Township vs. McClure*, 102 Pa., 322. *Glaub vs. Gishen*, 7 Kulp, 292. 2. Where a public road is so dangerous, by reason of its proximity to a precipice, that common prudence required extra precaution in order to secure safety for travelers, the township was bound to use such precaution. If it failed to do so, and the plaintiff without any fault of his own, fell over the unguarded embankment, and was injured in consequence of the neglect of the township, the latter is liable. *Dalton vs. Upper Tyrone*, 26 W. N., 489. *Trexler vs. Greenwich*, 168

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Pa., 214. 3. A township highway, unguarded by barriers, lay crowded between two railroads. The plaintiff's cattle, driven thereon, were frightened by a train on one railroad, and ran upon the track of the other railroad, where they were struck by a locomotive and killed. In trespass against the township for not providing barriers, and whether the absence of the latter was the proximate cause of the injury, the question was properly submitted to the determination of the jury. *Ewing vs. Versailles*, 146 **Pa.**, 310. 4. Roads and bridges are made for ordinary travel. Those in charge of them are not responsible for extraordinary accidents. If a road is so dangerous by reason of its proximity to a precipice, or any other cause that common prudence requires extra precaution in order to ensure safety to travelers, the municipal authorities are bound to use such precautions. *Hey vs. Philadelphia*, 81 **Pa.**, 44. 5. Plaintiff having brought suit for injuries sustained on account of the negligence of a township in not erecting and maintaining proper barriers upon a public road which it was repairing, and along which he was traveling, the court properly charged the jury, that if the place where he was injured was defective and unguarded, and the plaintiff was injured thereby, the fact that he was acquainted with the condition of the road did not of itself constitute negligence on his part, and would not defeat his recovery, provided he was exercising due care and caution at the time of the injury. *Mill-creek Township vs. Perry*, 20 **W. N.**, 359. 6. Whenever a highway is from any cause rendered so unsafe as to put the traveler upon it in peril, it is the duty of the township to do whatever is practicable and reasonable to render it safe. Where a township road ran for a distance parallel and adjacent to a railroad, with no fence between them, and a traveler's horse became unmanagable by fright at a passing train, and was struck by the train and killed, it is for the jury to say whether the township was negligent. *Plymouth Township vs. Graver*, 125 **Pa.**, 26. 7. A turnpike company is bound to keep its road in a safe condition for public travel. While excavations for

Roads—Continued.

grading are being made upon its road-bed, it is the duty of the company to guard that part of the road in actual use, and see to it that proper barriers or devices are erected to direct travelers, especially at night, into the proper track, and to warn them of danger. *Rhoads vs. Improvement Co.*, 1 Montgomery Co., 181. 3 *Idem*, 83. 8. Townships must keep their public roads in a safe condition. If a public road is near a precipice, extra precaution is required in order to secure safety to travelers, and the omission to do so is negligence. The township should erect walls or barriers along the sides of roads where they are unsafe. *Scott Township vs. Montgomery*, 95 Pa., 444.

XVIII. NEGLECT TO FIX THE WIDTH. The omission by the court to fix the width of the road at the time of the approval of the report of viewers, is fatal to the proceedings. The width cannot be fixed at a subsequent term of the court by an order *nunc pro tunc*. *Lackawanna Road, In re*, 112 Pa., 212. *Road Case*, 3 W. & S., 539. *Road Case*, 4 *Idem*, 39.

XIX. NEGLECT TO OPEN. 1. The duty of supervisors to open and repair township roads is joint, and in an indictment for neglect in its performance, it must be so charged. *Comm. vs. Oberdorfer*, 1 Kulp, 102. 2. Supervisors are liable to indictment for neglecting to open a public highway duly laid out in their respective townships. *Comm. vs. Riter*, 22 *Pittsburg Journal*, 175.

XX. NEGLECT TO OPPOSE USE. The use of ground by the public, as a highway for more than twenty-one years, makes it a public road as effectually as if laid out by the authorities. *Comm. vs. Cole*, 26 Pa., 187.

XXI. NEGLECT TO PRESENT PETITION FOR REVIEW. It is a fatal objection, under the general road law of June 13, 1836, that a petition for the review of a road was not presented and acted upon within two years after filing the original report. *Indiana County Road*, 51 Pa., 296.

XXII. NEGLECT TO REMOVE OBSTRUCTIONS. 1. In an action against a road company to recover damages for an

Roads—Continued.

injury to a traveler caused by his driving into a pile of stones lying in the road at night, the question of contributory negligence is for the jury. If the exercise of proper supervision by the company would have led to the discovery of the obstruction, the company is equally liable for an injury caused thereby, as if it had notice or knowledge of it. When the temporary occupation of a portion of the road by a person engaged in building is necessary, due care must be taken to guard the public from the danger. *Born vs. Plank Road Co.*, 101 Pa., 334. 2. Any one negligently leaving an obstruction or creating a defect in the highway, is liable to a party injured. The liability of the municipality after the defect has been brought to its notice does not cancel the liability of the obstructor; and the injured party may, if he so elects, sue at once the wrong-doer who is ultimately liable. *Gates vs. R. R.*, 150 Pa., 50. 3. Township officers are bound to provide for the ordinary needs of travel, and to remove obstructions and defects which would probably cause injury to the traveler along the highway. But where the road runs through a cultivated region with no unusual dangers or exposures, such officers are not bound to anticipate the dangers to which a broken wagon or a frightened horse may expose the driver. *Jackson Township vs. Wagner*, 127 Pa., 184. 4. Where the use of a steam rolling machine is necessary in the lawful construction or repair of a macadamized roadway, upon a highway already opened for travel, such use is lawful, and it is not negligence *per se* to permit the machine to stand on the highway at rest, over a Sunday, where it was reasonably impracticable to move it from the hard road. Its owners were not liable for an accident occurring in broad daylight, through the fright of a horse at the sight of the machine. *Keeley vs. Shanley*, 140 Pa., 213. 5. To entitle a person who is injured on a public road to recover damages from a borough or township, he must show that he was not guilty of contributory negligence, and also that the ordinary needs of public travel, conducted in the ordinary way, had not been antici-

Roads—Continued.

pated and provided for, and that his injury was the natural and probable consequence of neglect of duty on the part of the borough or township officers. The fact that a pile of loose stones remained for some time alongside of a wide public road, where there was ample room to pass, did not show negligence on the part of a borough. *Kieffer vs. Borough*, 151 Pa., 304. *WorriLOW vs. Chichester*, 149 Pa., 40. 6. The owner of lands adjoining a highway may lawfully place building materials thereon for a temporary use, where ample room is left for the free passage of vehicles and animals, and so long as the use thereof is not negligent or unreasonable. *Mallory vs. Griffey*, 85 Pa., 275. 7. When objects, ordinarily calculated to frighten horses, are placed and suffered to remain upon the public highway, they are regarded as obstructions, and, after due notice to the public authorities, a township is liable for injuries caused thereby. It matters not that the obstruction is outside the travelled route, and deposited there as private property, nor that the party injured might sustain an action against the person who deposited the obstruction by the roadside, as the plaintiff had the option to proceed against the township or the individual. *Manheim vs. Arnold*, 119 Pa., 380. 8. When, from extraordinary cause, for the existence of which the supervisors of a road are not responsible, and of which they cannot be presumed to have had notice, a driver loses control of his horses and they come in contact with a defect in the highway, the township is not liable for the resultant injury. *Schaeffer vs. Jackson*, 150 Pa., 149. 9. In an action against a township for negligence for failing to remove a stone heap from the public road, it was shown that a frightened horse ran away, broke a wheel and dragged the buggy upon the heap of stone, throwing the plaintiff out. It was held, that the plaintiff's injury was caused in part by the fright of the horse and the broken wheel, and in part by the negligence of the supervisors, and the township was responsible. The question of such negligence was for the jury. *Wagner vs. Jackson Township*, 133 Pa., 61. 10. Where, owing to the

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negligence of township authorities, a pile of ashes had accumulated on a highway, resulting in the overthrow and partial destruction of a sleigh and the running away of the horses, who were killed five miles distant by a moving locomotive, held, that the township was liable for the damage to the sleigh, but not for the killing of the horses, the ash pile being the remote and not the proximate cause of their being killed. *West Mahanoy Township vs. Watson*, 112 Pa., 574. 17 W. N., 465. 116 Pa., 344.

XXIII. NEGLECT TO REPAIR. 1. When a railroad company has taken possession of a public highway, it is the duty of both the company and the township to provide a safe road, and both will be liable in damages in case of neglect to do so. *Aston Township vs. R. R.*, 2 Delaware Co., 9. 2. In *quo warranto* against a road company for neglect to keep the road in repair, as provided for in its charter, it was no answer that the tolls derived from the road were not sufficient for that purpose. *Birmingham Turnpike Co. vs. Comm.*, 29 **Pittsburg Journal**, 135. 3. A corporation which is bound to keep its highways in repair, is answerable for an injury caused by a temporary occupation of the road by a person engaged in building, if sufficient time had elapsed for it to discover the obstruction. *Born vs. Plank Road Co.*, 3 **York Record**, 477. 4. A corporation which is bound to keep its highway in repair and safe condition, is liable for an injury caused by its neglect to do so, and it is immaterial whether the neglect was wilful or otherwise. Where ignorance of the defect results from omission of duty, actual knowledge need not be shown. *Born vs. Plank Road Co.*, 101 Pa., 334. 5. If, in consequence of the negligence of a township to keep and maintain a public highway in a reasonably safe condition, an injury has been sustained by the plaintiff, it is no defence that the injury was caused by the combined effect of the negligence of the township and a negligent act of a third person. The plaintiff could proceed against either, though only one actual recovery of damages could be allowed. A party who places a steam thresher by the road-

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side and thereby frightens a horse, may be held liable for his act of negligence, while a township may also be held liable in not properly guarding the edge of a public road which bordered a declivity. The town is liable for an injury of which a defect in the highway is the proximate cause. *Burrell vs. Uncafer*, 117 Pa., 353. 20 W. N., 321. 6. It is the statutory duty of supervisors of townships to keep their roads constantly in repair, and at all seasons to keep them clear of all impediments to easy and convenient passing and traveling. If there should be dangerous footwalks constructed on the public roads, and the supervisors would not be bound to put them in repair, it would be their duty to remove them without delay. No man has authority, without leave of the supervisors to occupy the public road with boardwalks. *Chartier's Township vs. Langdon*, 114 Pa., 545. 7. Where an accident to a traveler on a highway was produced by an intervening and independent cause, for which the township was not responsible, this would relieve the latter from responsibility, even if defects existed in the road. *Chartier's Township vs. Phillips*, 122 Pa., 601. 8. Where a city is in charge and control of a turnpike, either by purchase or abandonment of the franchise, it is bound to keep the highway safe and convenient for ordinary travel, and no more. It is not bound to pave with any specific material, or to keep the road up to the standard of a turnpike. *Comm. vs. Philadelphia*, 15 Phila., 85. 9. The act of January 26, 1849, having provided a specific remedy against a plank road company for neglecting to keep its road in repair, a bill for an injunction will not lie to meanwhile restrain it from collecting tolls. *Comm. vs. Plank Road Co.*, 35 Pa., 152. 10. An indictment against a turnpike company for not keeping its road in good repair, must set forth in what respect the road is defective. *Comm. vs. Turnpike Co.*, 16 Pa. County, 35. 11. An action on the case will lie against a township for the neglect of the supervisors to keep the road in repair. *Dean vs. Township*, 5 W. & S., 545. 12. Supervisors of the public highways are punishable by indictment for neglecting or refusing to open

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or repair a public highway. *Edge vs. Comm.*, 7 Pa., 275. 13. In an action against a township for a defective road, evidence may be given that plaintiff knew of its condition and of another and safer road. *Forks' Township vs. King*, 2 W. N., 653. 14. The duty of a municipality is to maintain its roads in such condition that the careful can use them in safety; but there is no obligation to maintain such a condition, that the heedless may not be injured. *Freck vs. Philadelphia*, 1 Pa. District, 248. 15. It is the duty of the supervisors of a township to keep in proper order and repair the public roads, and to see to it that they are in a safe condition for travel. If they neglect to do so, damages may be recovered for any bodily injury to a person traveling the road from an accident resulting from its defective condition, unless the traveler's own negligence contributed to the injury. If, however, the road becomes bad by reason of an extraordinary flood or freshet, or heavy fall of snow, the township is not liable for an injury resulting therefrom, unless it delays for a long period repairing the damage. *Fry vs. Perkiomen*, 1 Montgomery Co., 31. *Bishop vs. Schuylkill Township*, 20 W. N., 105. *Scholly vs. Mahanoy*, 1 Schuylkill Record, 4. 16. It is the duty of supervisors, not only to open roads, but to keep them in proper repair, so as render them safe for travel, not only in the day time, but by night. Failing to do so, the supervisors would be negligent; and if damage results to any one by reason of the roads being kept in a dangerous condition, the township must respond in damages as compensation for injuries resulting from such negligence. *Glaub vs. Goshen*, 7 Kulp, 292. 17. To support an action for damages against a municipal corporation for neglect to keep the highways in repair, an individual must show special and peculiar injury resulting to himself from the neglect. *Gold vs. Philadelphia*, 15 W. N., 63. 18. An innkeeper cannot recover damages against a borough for injuries alleged to have been sustained by him from loss of patronage, through the neglect of the defendant to repair and keep in passable condition the

Roads—Continued.

highway on which the inn is situated. *Gold vs. Philadelphia*, 115 Pa., 184. 19. A justice of the peace has no jurisdiction in an action against a township for the negligence of its officers in failing to keep a public highway in repair. *Hill vs. Tionesta Township*, 129 Pa., 525. 20. Where a road constructed by a canal company and never opened to public use by order of court, had been kept in repair for many years by the township and actually used by the public, it was the duty of the township to continue the repairs, and the question of their neglect to remove obstructions in the road was one for the jury to decide. *Lower Windsor Township vs. Gemmill*, 16 W. N., 265. 21. A township is answerable in its corporate capacity for neglect to keep its roads in repair, where such absence of repair results in injury to a traveler, who himself has not been negligent. It was not a defence to the township to show that by careful driving an accident might have been avoided at the place in question. That would fall far short of what is the purpose of a public highway. It must be kept in such repair that even *skittish* animals may be employed without risk of danger on it, by reason of the condition of the road. *Lower Macungie Township vs. Merkhoffer*, 71 Pa., 276. 22. The duty of the authorities to keep the entire street and sidewalks in the closely built up portions of a town or city, in safe condition for travel both by day and by night, is not the rule as regards country roads. *Monongahela vs. Fischer*, 33 *Pittsburg Journal*, 305. 23. When a public officer neglects to keep the highways in repair, the municipality which he represents must answer for it. *Newlin Township vs. Davis*, 77 Pa., 317. 24. Whenever a person or corporation, bound to repair a public highway, refuses to do so, when necessary; on notice from the proper public officers, they may make the necessary repairs, and recover the expense thereof in an action of *assumpsit*. *Penna. R. R. Co. vs. Duquesne Borough*, 46 Pa., 224. 25. Neglect to keep in repair the public roads in any municipal district is a violation of a public duty, and is punishable by indictment at common law. With us it is imposed

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by law in most cases upon the supervisors of townships. Sometimes in England the duty rests upon individuals by reason of tenure or prescription, or possibly by act of parliament. Under our act of January 19, 1860, where the repairing of the public roads of a township is taken by contract, and the road becomes out of repair, the contractor is held indictable therefor. *Phillips vs. Comm.*, 44 Pa., 197. 26. A turnpike company is bound, in consideration of its franchises, to keep its road in a safe condition for public travel. It cannot divest itself of responsibility by putting the duty upon a contractor employed to grade the roads. *Rhoads vs. Improvement Co.*, 17 W. N., 125. 27. Where, in an action against a township for negligence, there was evidence that, with notice to the supervisors, a rut a foot deep and a rod long was permitted to continue for a long time in a public road but ten foot wide cut upon a hillside, whereby the plaintiff's sled was overturned and himself injured, without contributory negligence on his part, it was not error to submit the question of negligence on the part of the defendant to the jury. *Sutter vs. Young Township*, 130 Pa., 72. 28. Where the property of a plank road has been sold at public sale under the foreclosure of a mortgage, there can be recovery against such company by a person who is subsequently injured by the overturning of his carriage owing to the unsafe condition of the road. *Wellsborough Plank Road Co. vs. Griffin*, 57 Pa., 419.

XXIV. NEGLECT TO TAKE UP REPORT OF VIEWERS. If a road report be filed at or before the term to which it is returnable, but has to pass over to an adjourned court, a confirmation *nisi* will not vitiate the proceedings. *Mead Township Road*, 66 Pa., 185.

XXV. NEGLECT TO USE. Mere laches of the public, or the non-user by them of a public highway, or adverse occupation by an individual, or all combined, although continued for twenty-one years, will not alone warrant the presumption of a grant to the person encroaching upon or obstructing the same, or estop the public. *Comm. vs. Moore*, 3 Lancaster Review, 281. 4 Kulp, 71.

Roofs.

NEGLECT IN CONSTRUCTING. Where the owner of a premises so constructs his roof that the rain water collecting thereon flows against the wall of his neighbor, causing damage, he cannot relieve himself of the responsibility by showing that if the wall had been well built the water would not have entered. Negligence which has no operation in causing the injury, but which merely adds to the damage resulting, is no bar to a recovery, though it will detract from the damages. *Gould vs. McKenna*, 86 Pa., 297.

Rules of Court.

I. NEGLECT IN CONSTRUING. 1. Each court is the best judge of its own rules, and the supreme court will not reverse for any construction given to them which is not palpably erroneous. *Coleman vs. Nantz*, 63 Pa., 181. 2. Courts will give their rules a liberal construction, and administer them so as to secure suitors in their constitutional rights. *Stone vs. Eisman*, 1 Luzerne Law Times, 123. 3. The court of common pleas being the best judge of the meaning of its rules of practice, the supreme court will not reverse for any construction given to them which is not palpably erroneous. *Wickersham vs. Russell*, 51 Pa., 73.

II. NEGLECT IN FRAMING. The courts of original jurisdiction have an inherent right to establish and enforce rules for the government of their practice. In ordinary cases, also, the construction of their own rules by such courts is accepted as conclusive, for they are their best exponents. It is only where wrong is manifest that their discretion will be interfered with or invaded. *Gannon vs. Fritz*, 79 Pa., 307.

III. NEGLECT TO OBSERVE. 1. While courts are the best exponents of their own rules, the supreme court will reverse when the court below has plainly disregarded or violated its own rules. *Brennan's Estate*, 69 Pa., 16. 2. The misapplication of its own rules by the court below, as well as the overruling of a motion for a new trial, are not reviewable in the supreme court. *Howser vs. Comm.*, 51 Pa., 332. 3. Rules

Rules of Court—Continued.

of court are always adhered to when in any neglect of them rights have accrued which it would be inequitable or unjust to disturb. When a failure to comply with a rule of court is the result of haste, mistake or surprise, and positive injury is likely to ensue to the party, courts will not adhere to it simply on account of the rule, at the expense of justice and the rights of the parties. *Magill's Appeal*, 59 Pa., 430. 4. The court below being more familiar with its own rules and the practice under them, a specification assigning error in the violation of one of its rules, will not be considered when it is not clearly made to appear that there was such violation. *Morrison vs. Nevin*, 130 Pa., 344.

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Sailors.

I. NEGLECT OF, WHEN SICK OR DISABLED. Under the maritime law, the right of seamen, when sick or disabled, to receive medical attention and drugs at the expense of the vessel, is part of the contract of service. For the expense of his cure, sailor had a remedy against the vessel, the owners and the master. *Holt vs. Cummings*, 102 Pa., 212.

II. NEGLECT TO OBEY ORDERS. It is the duty of a seaman to obey all orders given him by the officers of the vessel, and to wait for redress for ill-treatment or overwork until she is brought to her destination. *Endeavor, In re*, 16 Phila., 552.

III. NEGLECT TO RETAIN. The unjustifiable discharge of a mariner in a foreign port entitles him to wages, and to damages also, if accompanied with oppression. *Hayes vs. Wickwire*, 7 Phila., 594.

Sales. See "VENDOR AND VENDEE."

Saloons.

NEGLECT TO PROTECT CUSTOMERS. When one enters a saloon, the proprietor is bound to see that he is properly protected from the assaults of insults, not only of his employees, but of drunken visitors. *Rommel vs. Schambacher*, 5 Lancaster Review, 8.

Salvage.

I. NEGLECT IN ALLOWING. The value of the services of salvors is to be fixed by the court in its discretion. The circumstances, duration, danger, and probability of rescue by others, are to be considered. *Hall vs. Bark Paquet*, 7 Phila., 550.

II. NEGLECT TO ALLOW. 1. The rule of maritime law, that a passenger who has no opportunity to leave a vessel in distress cannot render a salvage service, may admit of a qualified exception where he has promoted her safety by an extraordinary and peculiar service which he was not compelled to render. Where a passenger of the nautical profession, who has rendered such service, afterwards exercised illegal authority over the vessel, the amount of salvage was materially reduced by reason of such usurpation of authority. *Brady vs. Steamship Co.*, 21 Pittsburg Journal, 197. 10 Phila., 283. 2. A salvage service is one where the services are rendered by parties not connected with the ship under circumstances which require removal in consequence of peril, not for the purposes of the voyage. *Cain vs. The Indiana*, 18 Phila., 555. 3. It is no objection to a claim for salvage, that the service has been rendered by the officers and crew of a national vessel, or that such vessel is in the service of a foreign nation. Salvage service should be estimated on a more liberal scale than a mere compensation for work and labor. *Robinson vs. The Huntress*, 5 Clark, 82.

III. NEGLECT TO EARN. A salvor is not entitled to compensation for labor and injury after he is informed that the property is not derelict. *Crowell vs. Chain*, 6 Phila., 478.

Satisfaction.

NEGLECT TO ENTER. The rule is well settled that, after a lapse of twenty years, a judgment is presumed to be satisfied, unless there are circumstances to account for the delay. The presumption of satisfaction, from lapse of time, arises in the case of every species of security for payment of money, whether bond, mortgage, judgment or recognizance. *Biddle vs. Bank*, 109 Pa., 355.

Savings Funds.

I. NEGLECT IN PAYMENTS. A rule of a savings bank provided, that if any person shall present a deposit book and falsely allege himself to be the depositor named therein, and shall obtain from the corporation money thereon, and the actual depositor shall not have given previous notice at the office of his book having been lost, the bank will not be responsible for the loss sustained by the depositor, provided such payment has been entered in the book of the depositor. Held, that the rule of the bank was necessary for its safety, and where plaintiff's book had been stolen and fraudulently used, he could not recover, although he was illiterate and had not read the rule. *Burrell vs. Savings Bank*, 92 Pa., 134.

II. NEGLECT OF DIRECTORS. The directors of a savings fund are liable to the depositors for maladministration of the office. Such directors as did not participate, and never took their seats in the boards, and against whom there is no allegation of fraud, are not liable. A bill in equity is the proper remedy for the defrauded depositors. The liability of the different members of a board of directors, charged with mismanagement of its affairs, will be determined by the aid of a master. *Leffman vs. Flanigan*, 5 Phila., 419, 155. *Maisch vs. Savings Fund, Idem*, 30.

III. NEGLECT OF MEMBERS. Where, by the constitution of an incorporated savings fund society, organized to receive deposits, it was provided, that the joint fund should alone be liable for the debts of the association; that no creditor should have recourse to the separate property of any member, held,

Savings Funds—Continued.

in an action by a special depositor, whose deposits were without restriction as to personal liability, that the members of the society were liable personally for the debt, unless it was clearly shown that the deposit was made subject to the restrictions contained in the constitution. *Beaver vs. McGrath*, 50 Pa., 479.

IV. NEGLECT OF NOTICE NOT TO PAY. Where money of A, by fraud or mistake, is deposited in a bank to the credit of B, the true owner may reclaim it, and a payment to B, after knowledge of the facts and a distinct notice not to pay, will not protect the bank. *McDermott vs. Savings Bank*, 100 Pa. 285.

V. NEGLECT OF RIGHTS OF DEPOSITOR. Where a husband and wife make a deposit in their joint names, they hold by entireties and not by moieties, and upon the death of either, the survivor takes the whole. *Donnelly's Estate*, 7 Pa. County, 197.

VI. NEGLECT TO PAY APPOINTEE OF DEPOSITOR. Where a depositor in a savings fund, has on the books of the company instructed the company to pay over his deposits to a particular party upon his death, it is not necessary that the company should demand letters of administration on his estate to be taken out before paying the appointee. *Knorr's Appeal*, 89 Pa., 93.

Scaffolding. See "BUILDINGS."

NEGLECT IN ERECTING. Plaintiff was injured by the fall of a scaffold, erected by his fellow-workmen and his employer. Proof was shown, that it was built in haste by men unfamiliar with the work, and without suitable nails, and without cleats. Held, that as these were questions of fact and not of law, they should have been left to a jury, and a binding charge in favor of the defendant was error. *Congle vs. McKee*, 151 Pa., 602.

School Directors. See "SCHOOLS."

I. NEGLECT BY ADOPTING NEW TEXT-BOOKS. An injunction will lie against school directors to restrain them from

School Directors—Continued.

adopting a new series of text-books, otherwise than as prescribed by law. *Krickbaum vs. School Directors*, 13 Luzerne Register, 66. 2 Delaware Co., 70.

II. NEGLECT IN MISAPPLYING FUNDS. School directors, who vote for a misapplication of public funds, are personally liable to the township for the amount so appropriated. *Dickinson Township vs. Linn*, 36 Pa., 431.

III. NEGLECT TO PERFORM DUTIES. 1. The act of May 8, 1854, which provides for the removal of school directors for neglect to perform their duties, does not apply where the neglected duty is one the performance of which calls for the exercise of deliberation and discretion. The court has no jurisdiction, unless all the members of the board are guilty of the neglect. *Pflueger vs. Lower Saucon*, 1 Northampton Co., 43. *Wallen vs. Lake, Idem*, 70. 2. The court may compel school directors to perform their duties or restrain them when they transcend their powers; but it cannot interfere in matters left to their judgment and discretion, even though they exercise such powers unwisely. *Snively vs. School Directors*, 1 Lancaster Review, 9.

Schools.

I. NEGLECT OF DIRECTORS. When a board of school directors fail to appoint a necessary teacher, it is such a neglect of duty as will authorize the court of quarter sessions to declare their seats vacant, and to appoint others in their stead. *Bloomsburg Directors' Appeal*, 121 Pa., 293.

II. NEGLECT OF RELIGIOUS INSTRUCTION. School directors may authorize the reading of a portion of the Bible and the singing of hymns, as a part of the opening exercises of the public schools, no one being compelled to participate in such exercises, and a suitable room in the school building being set apart for the exclusive use of the children of a different religious faith, during such exercises. *Hart vs. Sharpsville*, 2 Chester Co., 521.

III. NEGLECT TO ADMIT NEGRO CHILDREN. 1. Under

Schools—Continued.

the federal constitution, as amended, colored children have the same rights as white children to be admitted to the public schools. Mandamus will lie against school controllers for their refusal to admit them. The law cannot be evaded by setting apart schools for the exclusive use of negro children. *Comm vs. Davis*, 10 W. N., 156. 2. Since the act of June 8, 1881, school directors cannot deny a colored child admission on account of color to a public school, and assign him to a branch of the school in a neighboring building, for the separate instruction of colored children. *Kaine vs. Comm.*, 101 Pa., 490.

IV. NEGLECT TO PAY TEACHERS. Where a city controller neglects to countersign just warrants for teacher's salaries appropriated by the councils of a city, he may be held answerable in damages, and may be compelled by mandamus to perform the duty. *Zimmerman vs. Zimmerman*, 47 Pa., 382.

V. NEGLECT TO RETAIN PUPILS. School directors may, in the exercise of a sound discretion, exclude from the public schools pupils who have not been vaccinated. *Duffield vs. School District*, 162 Pa., 476.

Seals.

I. NEGLECT IN AFFIXING. The mere presence of an unnecessary seal affixed to an instrument by an agent not authorized to contract under seal, does not destroy the obligation of the contract. *McCarty vs. Zimmerman*, 20 Pittsburg Journal, 156.

II. NEGLECT IN FORM. 1. A seal is not necessarily of any particular form or figure. When not of wax it is usually made in the form of a scroll, but the letters "L. S.," or the word "seal," enclosed in brackets, or in some other design, are in frequent use. It may, however, consist of the outline without any enclosure. It may be in the form of a circle, an ellipse, or scroll, or it may be irregular in form; it may be a simple dash or flourish of the pen. The signature of the agent of a corporation being proved, the seal, though mere

Seals—Continued.

paper and wafer, will be presumed to be the seal of the corporation. *Hacker's Appeal*, 36 **Pittsburg Journal**, 101. *Penna. Gas Co. vs. Cook, Idem*, 259. 2. An impression upon wax, or the wax itself, was the only kind of seals known to the common law of England. In addition to this, we have by use and custom adopted as a seal a scroll made with ink. In using a scroll for a seal, it would be prudent not to depart from the common form which is generally used in making it, so that no possible doubt may arise as to its being intended for a seal. It would cause great confusion, if parties could substitute any mark or device their imagination might suggest for a seal. A dash, after a signature, is not a seal. *Waln's Estate*, 5 Pa. County, 52. 3. Any flourish or mark, however irregular, is a good seal, provided the parties intended it as a seal. The word "seal," or the letters "L. S.," written in an instrument, constitute a seal if so intended. *Lorah vs. Nissley*, 156 Pa., 329.

III. NEGLECT TO AFFIX. 1. The engraved letters "L. S." are not a seal, but merely indicate a place to put a seal. The use of seals by individuals is fast disappearing. They have no longer any effect to destroy the negotiability of corporation and municipal bonds. The use of seals originated before men could write their names, but now, since men can affix their signatures, sealing is superfluous and useless. The attributes of negotiability in a note cannot be taken away by the use of a corporate seal. *Bancroft vs. Haines*, 31 W. N., 249. 2. The letters "L. S." appended to a lease, judgment note, etc., mean *locus sigilli*, the place of the seal, and do not constitute a seal. Merely signing before them is not an adoption of them as a seal. Unless by some act or declaration of the signer showing his adoption of them as a seal, the instrument signed is a simple contract, and not a specialty. Sealing implies some act of him who is alleged to have sealed. In this state and in most of our states, any stroke of the pen in the place for the seal adopted by the signer is sufficient. It is not necessary in these days to use wax. The intention of the party to seal

Seals—Continued.

must appear on the paper. *Bennet vs. Allen*, 20 Phila., 423. 10 Pa. County, 256. 8 Lancaster Review, 133. 3. The common law required for a good seal not only wax, but an impression upon the wax. In Pennsylvania, at a very early day, an ink seal was held to be a good substitute for a wax seal; and the common law rule that any number of parties might use the same seal was recognized here. In *Duncan vs. Duncan*, 1 Watts, 322, it was held, that a blue ribbon drawn through a slit in the parchment, but without any wax wafer or scroll, was not a seal, though the instrument declared that it was given under my hand and seal. *Spencer vs. Haynes*, 4 W. N., 153.

Search Warrants.

NEGLECT IN ISSUING. No search warrant for stolen articles, under our state constitution, shall issue unless the goods are particularly described. *Moore vs. Cox*, 10 W. N., 135.

Securities.

NEGLECT IN TRANSFERRING. The mere fact that one who wrongfully pretends to act for another in transferring his securities has possession of his certificates of loan, and presents them to the officers of the company for transfer, does not of itself justify the officers in making a transfer of the loan on the books of the company. *Lehigh Coal Co. vs. Mohr*, 83 Pa., 228.

Sentences.

I. NEGLECT IN RENDERING. A sentence exceeding the term allowed by law will be reversed on *certiorari*. *White vs. Comm.*, 3 Brewster, 30.

II. NEGLECT IN TIME. A sentence may be amended at the term at which it is pronounced, but not later. It must be definite, and not dependent upon the future exercise of a discretion. *Comm. vs. Patterson*, 5 Kulp, 307.

Servant. See "MASTER AND SERVANT."

I. **NEGLECT IN MASTER'S PRESENCE.** The unlawful act of a servant in his master's presence, and without his expressed opposition, in driving recklessly, whereby his wagon collided with another vehicle, renders the master responsible for injury occasioned thereby. *Strohl vs. Levan*, 39 Pa., 177.

II. **NEGLECT OF DUTY.** A master is not liable in trespass for the acts of his servant, unless done by his order. He is liable for the servant's negligence or unskillfulness. *Yerger vs. Warren*, 31 Pa., 321.

III. **NEGLECT OF FELLOW-SERVANT.** Where several persons are employed in the same general service, in the prosecution of which one is injured through the carelessness of another, the employer is not responsible; yet where such employer has knowingly employed a workman incompetent for the business, through whose carelessness or inability an accident happens, the employer may be held responsible. *Frazier vs. Penna. R. R.*, 38 Pa., 104.

Set-off.

I. **NEGLECT IN BORROWING A CROSS DEMAND.** A debtor has a right to purchase but not to borrow a cross demand to extinguish a claim against himself. *Russell vs. Spear*, 4 W. N., 476.

II. **NEGLECT IN CLAIM.** 1. A set-off can only be made of a debt or demand, which existed at the time of the commencement of the action; and the defendant must be able to show that it was then his. *Huling vs. Hugg*, 1 W. & S., 418.
2. A demand, to be set off, must belong to the party using it, at the commencement of the suit. *Smith vs. Ewer*, 22 Pa., 116.
3. A cross demand may be set off, but it must belong to the defendant before the plaintiff commences his action. *Speers vs. Sterrett*, 29 Pa., 192.

III. **NEGLECT IN PRESENTING.** That which can be set off as an independent counter-claim, must be such as a jury can find and liquidate in the ordinary way, just as if the defendant was suing. Set-off to set-off cannot be permitted;

Set-off—Continued.

and an unadjusted question of account and profits from a long and complicated business, to be found in numerous books of account, cannot be tried by a jury at bar. *Russell vs. Miller*, 54 Pa., 155.

IV. NEGLECT TO ALLOW. 1. A claim which is disputed cannot be set off against a judgment. *Anderson's Appeal*, 2 Walker, 491. *Linen vs. Felts*, 13 Lancaster Bar, 24. 2. One judgment may be set off against another, where both are in the same right, though in different courts. But where stay of execution has been obtained on both judgments, and the expiration of the stay is at different periods, set-off will not be allowed. *Best vs. Lawson*, 1 Miles, 11. 3. Where a defence existed, and might have been set up in an action, the defendant cannot after recovery in a subsequent action, ask to be allowed a credit on the prior judgment for the amount of such subsequent judgment. He has had his day in court, and failed to use it, and hence cannot be relieved. *Bindley's Appeal*, 34 Pittsburgh Journal, 253. 4. To a judgment, there can be no set-off of a debt not in judgment; nor can the judgment be opened because the defendant has an account against the plaintiff equal to the amount of the judgment. *Bowman vs. Davis*, 8 Montgomery Co., 29. *Bower vs. Messenger*, Northumberland Co. News, 137. 5. Where the maker of a promissory note under seal has notice that the payee has assigned the note to another person, he cannot purchase a note of the payee to be used as a set-off against his own note. In general, in order to support a set-off, there must be cross demands between the same parties and in the same rights, such as would sustain mutual actions against each other. *Burford vs. Fergus*, 165 Pa., 310. *Hibert vs. Lang*, *Idem*, 439. 6. One judgment may be set off against another, but a debt or claim not in judgment cannot be set off. A claim due to a third person cannot be used by the defendant as a set-off against the judgment debt. *Cowden's Estate vs. McClelland*, 4 Montgomery Co., 133. 7. Unliquidated damages arising *ex contractu* from any bargain may be set off under the Pennsylvania defalcation act, wherever they are

Set-off—Continued.

capable of liquidation by any known legal standard. But contingent profits or speculative losses cannot be set off. *Detweiler vs. Strasser*, 5 C. P. Reporter, 257. *Frey vs. Salamon*, 11 Lancaster Bar, 104. 8. The court will not order a judgment obtained against the plaintiff by a third person and assigned to the defendant, to be set off against a judgment obtained by a plaintiff against the defendant, when the plaintiff has, previously to the assignment of the judgment, made over his property for the benefit of his creditors. *Duncan vs. Calbraith*, 1 Browne, 47. 9. A defendant's right to set-off must be perfect at the time suit is instituted against him. *Garrison vs. Paul*, 29 **Pittsburg Journal**, 346. 10. It is well settled, that matters sounding in tort and arising out of a different transaction, cannot be given in evidence as a set-off, by a defendant sued in an action *ex contractu*. *Groetzinger vs. Latimer*, 416 **Pa.**, 628. 11. Matters *ex contractu* arising out of a different transaction from the one in suit may be proved by way of set-off. Unliquidated damages arising *ex contractu* from any bargain may be set off under the defalcation act of 1705. *Hunt vs. Gilmore*, 59 **Pa.**, 450. *Halfpenny vs. Bell*, 82 **Pa.**, 128. 12. Fraud, unless inherent in the transaction which is the subject-matter of suit, is not available as a set-off. *Kennedy vs. Aber*, 1 Pa. District, 770. 13. Damages for which an action in tort might be maintained, may be set off in an action on a promissory note. *Nixon vs. McCrory*, 101 **Pa.**, 289. 14. The individual judgment of one of two defendants in a joint judgment against the plaintiff can be set off against the joint judgment. A judgment for a debt may be set-off against one for a tort. *Pasek vs. Vockroth*, 11 Lancaster Review, 78. 15. A debtor has a right to purchase a cross demand, to extinguish a claim against himself, by set-off. If, however, the security offered as a set-off has been merely borrowed for the purpose, it will not be allowed. *Russell vs. Spear*, 12 Phila., 276. 6 Luzerne Register, 250. 16. A set-off may be allowed under circumstances which would not justify a right of action upon the matter thus set off. *Seybert vs.*

Set-off—Continued.

Hicks, 9 Luzerne Register, 49. 17. The right to set off one judgment against another is not a legal but an equitable right, and will not be permitted where it infringes on another's right of equal grade. *Shoemaker vs. Flosser*, 5 Kulp, 437. 18. A judgment debtor, who for a consideration has waived the benefit of the debtors' exemption law, will not be permitted to buy a judgment against the plaintiff in which there is no waiver, and have it set off in spite of the latter's claim to have the benefits of the exemption law. *Shoemaker vs. Flosser*, 8 Pa. County, 479. 19. Where judgment before a justice of the peace is entered for less, but set-off claimed for more, than \$5.33, an appeal should be allowed, unless it clearly appears that the set-off was not offered in good faith, but for the purpose of preventing the judgment from being final. *Steele vs. Walton*, 3 Pa. County, 211. 20. While a literal construction is given to the act of 1705 allowing set-off and defalcation of a debt, yet, as a general rule, the debt must be in the same right. It is inadmissible, when the plaintiff's cause of action is for a breach of contract to fulfil an official or fiduciary obligation. *Tagg vs. Bowman*, 99 Pa., 379. 21. An agent or attorney who, by virtue of a special authority, has received money, cannot, when sued by the principal, set off a debt due to himself in a matter not arising out of his agency. *Tagg vs. Bowman*, 108 Pa., 273. 22. To a judgment there can be no set-off of a debt not in judgment. One judgment may be set off against another through the equitable powers of the court, but to a judgment ripe for execution, the only answer is payment. *Thorp vs. Wegefarth*, 56 Pa., 85. 23. A defendant in a suit is not entitled to set-off against the plaintiff damages for a breach of contract between them, unless said breach was complete at the time of suit brought. *Zuch vs. McClure*, 98 Pa., 541.

V. NEGLECT TO ACQUIRE CLAIM. The plea of set-off cannot be supported by a defendant upon a claim against the plaintiff acquired after the institution of the suit. *Stewart vs. Ins. Co.*, 9, W., 126.

Set-off—Continued.

VI. NEGLECT TO AVER TIME. In an affidavit of defence, an averment of set-off must be precise and certain as to time. *Markley vs. Stevens*, 89 Pa., 279.

VII. NEGLECT TO CLAIM. 1. The act of March 20, 1810, provides that a defendant in a suit before a justice of the peace, who shall neglect or refuse to set off therein any demand he may have against the plaintiff, not exceeding \$100, shall be debarred from recovering it by an after suit. *Felpel vs. Hershour*, 128 Pa., 587. 2. Before taking the assignment of a bond, it is the duty of the party to inquire whether the obligor had any defence, and if he stated that he had no defence or set-off, the previous acts and declarations of the obligees would be of no avail. *Gamble vs. Hepburn*, 90 Pa., 441. 3. A set-off is in the nature of a cross action, and may be withdrawn, in analogy to suffering a nonsuit, where the evidence is weak, but the withdrawal should be explicit. *Muirhead vs. Kirkpatrick*, 5 W. & S., 506. 4. In a suit before a justice, the defendant is not bound to submit a counter-claim, as a set-off, where it exceeds \$100. He is not bound to select a single item of less than that amount and set it off. *Simpson vs. Lapsley*, 3 Pa., 459. 5. Set-off is only allowable in favor of a defendant; hence there is no such thing as set-off against set-off. *Ulrich vs. Berger*, 4 W. & S., 19.

VIII. NEGLECT TO CLAIM IN FULL. Set-off being in the nature of a cross action, the entire claim must be prosecuted in the action in which it is set up; where the set-off exceeds the demand, it cannot be used merely *pro tanto*, but a certificate will be found in defendant's favor. *Jennings vs. Hare*, 104 Pa., 489.

IX. NEGLECT TO LIMIT. The power of set-off is not limited to judgments of the same court, and it seems that a transcript from the judgment of a justice filed in the common pleas becomes a judgment of that court. *Frable vs. Snyder*, Lehigh Valley Rep., 102.

X. NEGLECT TO PLEAD. 1. A party may, by express contract, preclude himself from pleading a set-off. Such a

Set-off—Continued.

contract, founded upon consideration, would bind him. Probably a defendant may also debar himself from using a set-off by a contract not express. Thus, if he receive money for a particular use, he cannot apply it to any other use, and, of course, not to his own. *Ardesco Oil Co. vs. N. A. Oil Co.*, 66 Pa., 380. 2. Where special matter of evidence is intended to be given at the trial under the plea of set-off, notice of such fact should be filed with the plea. The mere fact that it was set forth in the affidavit of defence filed, will not suffice to prevent its being rejected when offered as evidence. *Finlay vs. Stewart*, 56 Pa., 193. 3. Where a defendant's demand is more than \$100, he is not bound to set it off in a suit against him before a justice of the peace. The test is, not the amount recovered, but the amount of the claim in good faith. *Gillum vs. Kahnweiler*, 10 Lancaster Review, 397. 4. By the act of 1705, an omission of a defendant to set off a claim in a suit against him is no bar to a subsequent action for the same. Even if he plead the claim as a set-off, yet, being in the nature of a cross action he may withdraw it from the consideration of the jury. By pleading set-off, the defendant cannot prevent the plaintiff from suffering a nonsuit, although issue had been joined on the plea. *Gilmore vs. Reed*, 76 Pa., 462. 5. In actions at law, the bar of the statute is equally applicable to the defendant's cross demand as to the plaintiff's claim. Set-off is in the nature of a cross action, optional with the defendant, and the statute runs against it until pleaded, and even then the plea may be withdrawn. *Reed vs. Marshall*, 90 Pa., 348.

Settlements.

NEGLECT TO RECORD. The fact of an ante-nuptial settlement being retained and unrecorded during the husband's lifetime, does not afford such conclusive evidence of fraud as to render it void. *Smith's Estate*, 18 W. N., 140.

Sewers.

I. NEGLECT BY POLLUTING A STREAM. Where a city constructed a sewer, resulting in its contents emptying into and polluting a stream, a party injured is entitled to damages. *Good vs. Altoona*, 162 Pa., 493.

II. NEGLECT IN CONSTRUCTION. 1. In an action against a city to recover damages for an injury to a wharf caused by deposits from a sewer, it was competent for the plaintiff to show that the injury could have been avoided by an extension of the sewer. *Butchers' Ice Co. vs. Philadelphia*, 156 Pa., 54. 2. A city contractor for building a sewer is liable for the negligence of his employees by which damage occurs to a citizen. The action does not lie against the city. *Erie vs. Caulking*, 25 *Pittsburg Journal*, 162. 3. Where a contractor is employed by a municipality to build a sewer, and has finished the work, and the sewer has been accepted by the city, the contractor is not liable, at the suit of a property owner, for an injury to property caused by a break in the sewer, although due to its negligent construction. *First Presbyterian Congregation vs. Minnahan*, 163 Pa., 561. 4. Equity will not interfere to restrain a borough from creating a nuisance by the construction of a sewer, unless the injury is such as is not capable of adequate compensation by a suit at law. A sewer should not be constructed so as to empty its contents upon private property. *Reading Iron Works vs. South Chester*, 2 Delaware Co., 455. *Morton vs. Chester*, *Idem*, 459. 5. The city of Philadelphia has no power to construct a culvert or sewer in a street, until it has been legally and properly opened. *Wistar vs. Philadelphia*, 71 Pa., 46. 6. A municipal corporation is not liable, under the constitution, for damages to property occasioned by the inadequacy of a sewer constructed by it. *Bear vs. Allentown*, 148 Pa., 80. *Fairlawn Coal Co. vs. Scranton*, *Idem*, 231. 7. A municipality was required by an act of the legislature to build a sewer along the bed of a creek of sufficient capacity to carry off its waters. Without any negligence on the part of the city, a sewer was constructed which was not of sufficient size to drain the creek, and during a rain-storm it

Sewers—Continued.

overflowed. In a suit for damages resulting therefrom, held, that the city was not liable for the mistake or lack of judgment of its officers or contractors in the honest, fair exercise of their duties. *Collins vs. Philadelphia*, 93 Pa., 272. 8. The mere omission of municipal authorities to provide adequate means to carry off the water which storms and the natural formation of the ground throw on a city lot, will not sustain an action by the owner thereof against the municipality for damages arising from the accumulation of water on said lot, by reason of the construction of a sewer that was not of sufficient size to carry off the surface drainage. Where the sewers were not defectively constructed or left out of repair, the city is not responsible for an error in judgment as to the size a sewer should have been constructed. *Fair vs. Philadelphia*, 88 Pa., 309. 8 *Luzerne Register*, 225. 9. A city may connect its sewers with any natural channel for the flow of water, without incurring liability to keep that channel open to its mouth. The corporation is not liable to lot owners for damages occasioned by the caving in of the old sewer, unless the damage was caused by the negligence of its agents, or in not keeping it in repair, or in bringing into it such an additional quantity of water as to gorge and break it. *Munn vs. Mayor of Pittsburg*, 40 Pa., 364. 10. Where a sewer is constructed in a workmanlike manner, and due care has been taken to keep it in proper order, and it was broken only by a rainfall so extraordinary as to be without the range of probability, the city would not be chargeable with negligence. But if the break was owing to the defective condition of the sewer, and the city had omitted the duty to examine and repair it, the case is different. In such case, compensation for loss is the measure of damages. The permanent injury to adjacent buildings, the cost of repairs, the loss of rent pending the repairs, are elements to be considered. *Vanderslice vs. Philadelphia*, 103 Pa., 102.

III. NEGLECT IN DISCHARGING. 1. The city of Philadelphia is not liable to the lessees of wharves, who may be damaged by the filling up of the space around them by matter discharged

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from culverts, emptying into the river beyond low-water mark, as such lessees have no title beyond the low-water line. *Watson vs. Philadelphia*, 30 *Pittsburg Journal*, 360. *Bolster vs. Allegheny, Idem*, 204. 2. A city has no right to drain the sewerage from a street into a stream flowing through the property of a citizen. *Martin vs. Philadelphia*, 26 W. N., 120.

IV. NEGLIGENCE IN LOCATION. To entitle a party, who claims to be injured, to recover damages because of the building of a sewer by a city, there must be an actual and immediate depreciation of the value of the property consequent upon its construction. *Bear vs. Allentown*, 3 *Northampton Co.*, 101.

V. NEGLIGENCE OF CONTRACTORS. A municipal corporation is not responsible for an injury occasioned by the negligence of contractors, or of their agents or servants, in making excavations for sewers; the remedy for an injury is against the contractors alone. *Painter vs. The Mayor of Pittsburg*, 46 Pa., 213. 2 *Pittsburg*, 339.

VI. NEGLIGENCE OF LIABILITY FOR THE CONSTRUCTION. The cost of constructing a sewer can be assessed only upon the property abutting upon the line of the improvement. *Parker's Appeal*, 169 Pa., 433.

VII. NEGLIGENCE OF PROPER CAPACITY. Insufficiency of drainage is not always negligence, but may result from want of judgment. Where property is injured by the constructing of a sewer, unless the rain was extraordinary, it was held, that the party injured could recover. *Fairlawn Coal Co. vs. Scranton*, 2 *Lackawanna Jurist*, 100.

VIII. NEGLIGENCE TO CONSTRUCT. 1. An action will not lie against a municipal corporation for neglecting to construct a proper system of drainage. A power to construct sewers, given to a town by statute, does not impose an obligation on the authorities to exercise the power conferred. *Carr vs. Northern Liberties*, 35 Pa., 324. 2. A municipality is not liable for the flooding of private property from the inadequacy of gutters, drains, culverts or sewers. *Costello vs. Conshohocken*, 8 Pa. County, 639.

Sewers—Continued.

IX. NEGLIGENCE TO GUARD EXCAVATION. 1. A borough authorized a contractor to dig a sewer on one of its streets. While the work was in progress, a woman fell in the ditch and was injured. Held, that the borough was not liable. *Susquehanna Depot vs. Simmons*, 34 *Pittsburg Journal*, 65. 2. Where, through the neglect of a contractor, the excavation connecting with a street sewer was left unguarded at night, and a pedestrian was injured by falling into it, held, that the municipality was not responsible therefor, unless by the terms of the contract the contractor was under its management. *Erie vs. Caulkins*, 85 Pa., 247. *Painter vs. Pittsburg*, 2 *Pittsburg*, 339.

X. NEGLIGENCE TO PROTECT MANHOLE. A city is liable for the faulty construction of covers to manholes in sewers by which the vapors and gases generated are prevented from escaping, resulting in occasional explosions of sewer gas, uplifting of the manhole iron covers and injury to passers-by. *Comly vs. Philadelphia*, 11 W. N., 532.

XI. NEGLIGENCE TO REPAIR. 1. In an action against the city for damages from a sewer, where there was evidence that the city remedied the defect as soon as notified, and that it was in part occasioned by the improper construction of plaintiff's vault, no recovery can be had. *Gabrylewitz vs. City*, 9 *Phila.*, 271. 2. If a sewer is large enough to carry off the usual flow of water, but is clogged up or out of repair, its capacity is immaterial. It is the duty of the borough authorities to keep it in repair and working order. *Markle vs. Berwick Borough*, 142 Pa., 84. 3. Where a municipality has constructed a sewer, it is its duty to keep it in good condition and repair; failure to do so will render the city liable in damages. Mere absence of notice that the sewer is out of repair, will not necessarily absolve the city from a charge of negligence; it should exercise watchfulness in ascertaining, from time to time, the condition of its sewers. The city is presumed to have knowledge of an open defect after a reasonable time for its ascertainment and removal; but for a latent defect, the

Sewers—Continued.

city will not be liable unless it had notice. *Vanderslice vs. Philadelphia*, 103 Pa., 102.

Sheriff.

I. NEGLECT BY DELAYING EXECUTION. An execution cannot be postponed for the sheriff's default. His procrastination, even by the sufferance of the creditor, is not fraudulent *per se*, and postpones only where the latter directs him not to proceed. *Hickman vs. Caldwell*, 4 R., 376. *McCoy vs. Reed*, 5 W., 300.

II. NEGLECT BY MISPAYMENT. A sheriff cannot protect himself by payment of money to an attorney for a judgment creditor, after he has received notice of the revocation of the attorney's authority. *Irwin vs. Workman*, 3 W., 357.

III. NEGLECT IN ACCEPTING SECURITY. 1. A sheriff is liable for taking insufficient sureties in an action of replevin, even after the assignment of the replevin bond to the defendant. *Myers vs. Clark*, 2 W. & S., 535. 2. The sheriff is answerable for the sufficiency of sureties in a replevin bond, at the termination of the suit. It is not enough that they were sufficient when they were taken. *Pearce vs. Humphreys*, 14 S. & R., 23.

IV. NEGLECT IN ALTERING RETURN. It is not competent for the sheriff to alter or amend a return which has been made. Any alteration of the return after its delivery to the prothonotary without leave of the court is invalid. *Deacle vs. Deacle*, 160 Pa., 206.

V. NEGLECT IN DEMANDING EXTRA COMPENSATION. It is illegal for a sheriff to charge for services for which compensation is fixed by law, any other or further fees. A promise to reward such an officer for doing his official duty is void. *McCandless vs. Steel Co.*, 39 Pittsburgh Journal, 299.

VI. NEGLECT IN DISTRIBUTION. 1. Where a sheriff sells property subject to mechanics' liens and pays over the proceeds to creditors before the return day of the writ, he is liable to mechanics' lien creditors for claims filed after the return day,

Sheriff—Continued.

if otherwise in time. *Bird vs. Slirk*, 2 Foster, 147. 2. A sheriff, on his own authority, distributing money levied under several executions before the return day of the writs, does so at his own risk. The command of the writ is, not to pay the plaintiffs, but to bring the money into court on the return day. In practice, the sheriff usually assumes the responsibility of disbursing, thus avoiding the expense and delay incident to a payment into court. *Williams' Appeal*, 9 Pa., 267.

VII. NEGLIGENCE IN MAKING A LEVY. 1. It is essential to constitute a valid levy under an execution, that the property levied must be within the power and control of the sheriff, or at least within his view. Therefore, where the property levied upon, a planing-machine, was, at the time of the levy, ten miles distant, and was not seen by the sheriff until after the return day of the execution, it was held that no lien was created on such machine by the levy. *Duncan's Appeal*, 37 Pa., 500. 2. If, at the time of the levy by the sheriff upon goods of one man in the custody of another, the sheriff knew that the custodian of the property had made addition to the stock in hand, out of his own means, then the sheriff would be liable as a trespasser, as to all such additional goods, unless he gave the custodian notice that he should select out and remove the same. *Helfrich vs. Stern*, 17 Pa., 153. 3. To constitute a valid levy under an execution, the property levied must be in the power or the view of the sheriff at the time it is made. It will not suffice for the sheriff to levy upon articles at a distance simply from a list furnished by the plaintiff's attorney. *Linton vs. Comm.*, 46 Pa., 294. 4. Though, as between successive execution creditors, it is essential that the sheriff designate the property seized in the body of his return, or by reference to an accompanying schedule, yet as to all others, a valid levy may be made without either endorsement or schedule. *Weidensaul vs. Reynolds*, 49 Pa., 73.

VIII. NEGLIGENCE IN THE PAYMENT OF MONEY. 1. A sheriff may, in the absence of any notice or rule to pay the money into court, apply the proceeds of real estate to the liens; but

Sheriff—Continued.

he does so on his own responsibility. Where parties are not satisfied for the sheriff to make distribution, they can prevent it by promptly applying to the court, but not after the sheriff in good faith has applied the money to the liens. *Bastian, In re*, 90 Pa., 472. *Franklin Township vs. Osler*, 91 Pa., 160. 2. Where a sheriff has two executions in his hands, placed there on different days, but against the same defendant, and through a mistake of his own sells all of defendant's goods on the latter writ instead of the former, and pays the money over to the plaintiff in the second writ, he cannot recover it, although he has rendered himself liable on the first execution. Whenever money is paid to a party, who receives it in good conscience, and uses no deceit in obtaining it, an action for money had and received will not lie against him to recover it, even though it have been paid him by mistake. *Taylor vs. Commrs.*, 5 P. & W., 112. *Espy vs. Allesin*, 9 W., 462.

IX. NEGLECT IN RETURN. 1. Where the return on its face does not show a legal service of the writ, the service may be set aside. The return being considered conclusive as between the parties to the action, it is error to set aside the service upon extraneous evidence. Affidavits and depositions are no part of the record. *Benwood Iron Works vs. Hutchinson*, 101 Pa., 362. 2. A return in the name of a deputy sheriff is improper, and is insufficient to bring defendants into court so as to authorize a judgment by default. Such return may be amended by the sheriff if in office. *Bolard vs. Mason*, 66 Pa., 138. 3. Where the true meaning of a sheriff's return is involved in doubt, that construction will be put upon it which best accords with the presumption that his acts have been regular. *Phillips vs. Kuhn*, 7 Phila., 146. *Comm. vs. Lelar*, 1 *Idem*, 333, 336. *Bradley vs. Forepaugh*, 7 W. N., 392. *Myers vs. Griner*, 2 W. N., 324. 4. "*Mortuus est*," and not "*nihil habet*," is the proper return for the sheriff to make to a writ where the defendant is dead. *Burr vs. Dougherty*, 8 W. N., 175. 5. The sheriff's return of service is conclusive; if defective on its face, the

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defendant should rule the sheriff to amend it. He cannot object at the trial. *Church vs. Church*, 5 W. & S., 215. 6. The sheriff's return to a venire may be amended after verdict. *Comm. vs. Martin*, 10 Luzerne Register, 15. 7. A sheriff is not liable for false returns to parties other than to parties to the suit. *Curran vs. Elliott*, 9 W. N., 367. 8. After judgment on the *scire facias*, it is too late to inquire in any collateral proceeding, into the sufficiency of the sheriff's return of service of the writ, or whether service was properly made, if it be returned. *Delaney vs. Gault*, 30 Pa., 68. 9. When a sheriff, after an offer of indemnity or without a demand therefor, returns an execution *nulla bona*, he does so at his own risk, and if it is shown that there is property of the defendant which he might and ought to have levied upon, he will be responsible to the plaintiff. *Dornin vs. McCandless*, 146 Pa., 344. 10. In an action against a sheriff for a false return on a *fi. fa.* the measure of damages is *prima facie* the debt called for in the execution. In mitigation of damages, he may show that other writs of execution in his hands would have taken the proceeds of a sale. *Forsyth vs. Dickson*, 1 Grant, 26. 11. The sheriff may amend his return though nearly one year has elapsed since it was made, and though money has been expended on the faith of its correctness. *Haskins vs. Dill*, 7 W. N., 258. 12. A sheriff out of office cannot amend his return so as to defeat an action brought against him for damages. *Peck vs. Whitaker*, 103 Pa., 299. 13. Falsity of the sheriff's return is no ground for setting aside the service of a writ; the defendant's remedy is against the sheriff for a false return. It has been the practice of our courts to set aside a defective service only where the defect appears on the face of the return. *Smith vs. Hooton*, 3 Pa. Dist., 250. 14. A sheriff cannot be compelled to alter his return; but may do so, on leave given by the court. *Vastine vs. Fury*, 2 S. & R., 426. 15. An action against a sheriff for making a false return must be brought in the court where the suit originated. *White vs. Taylor*, 13 W. N., 27. 16. The court has no power to make

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a peremptory order on the sheriff to amend his return as to matter of fact. *Wilkesbarre Building Ass'n vs. Zeis*, 9 Luzerne Register, 187.

X. NEGLECT IN RETURN TO AN EXECUTION. The permission to a sheriff to amend his return to an execution is within the discretion of the court. An aggrieved party may have recourse to the sheriff. *Prather vs. Chase*, 3 Brewster, 206.

XI. NEGLECT IN SELLING THE GOODS OF A STRANGER. Whenever a sheriff, disregarding a notice of title given to him, proceeds to advertise and sell the goods of a stranger to the execution, he is liable in trespass to the owner of the goods. *Freeman vs. Apple*, 99 Pa., 261.

XII. NEGLECT IN SERVICE OF SUMMONS. The sheriff should be held to the strictest accountability for service upon a resident defendant, because he is presumed to know, or may ascertain upon inquiry, the residence of every person in the county. A more relaxed rule prevails as to non-resident defendants temporarily sojourning there. If pointed out, of course he is bound to make the service. He cannot be asked to do more than to follow instructions. He may then serve the defendant or his clerk or agent at his usual place of business or residence. *Hamilton vs. Lyle*, 9 Phila., 98.

XIII. NEGLECT OF DEPUTY. 1. The act of March 31, 1843, prohibits a deputy sheriff in Philadelphia from demanding or receiving a fee or compensation not allowed by the fee bill. If he does so, the court may order the sheriff to dismiss the deputy and not reappoint him. *Borie's Petition*, 8 Phila., 353. 2. For all civil purposes, the sheriff is answerable for the conduct of his deputy, though not criminally. The sheriff's deputies are frequently men of small property, and sometimes of bad character, and the responsibility ought to rest on the principal, who has the sole power of appointing and removing them. *Hazard vs. Israel*, 1 B., 240. 3. The act of March 31, 1843, provides, that if any deputy sheriff shall take or demand an illegal fee, it shall be the duty of the court, on complaint being made, to grant a rule on the sheriff

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to show cause why such deputy should not be dismissed from office. *Leeds' Appeal*, 75 Pa., 75. 4. For all civil purposes, the sheriff is answerable in an action of trespass for the conduct of his deputy. *Wilbur vs. Strickland*, 1 R., 458.

XIV. NEGLIGENCE, RESULTING IN ESCAPE. 1. The sheriff is guilty of an escape, who arrests under a *testatum ca. sa.*, and commits the debtor to the jail of any other county than his own. *Avery vs. Seeley*, 3 W. & S., 494. 2. A sheriff is not liable to conviction for an escape, unless he has been guilty of gross negligence in the discharge of his official duty, and unless such negligence contributed to the escape of the prisoner. *Comm. vs. Medland*, 5 Pa. County, 233. 3. If a party is held on final process, the sheriff becomes absolutely liable for the debt and costs, by suffering the prisoner to go at large, and he cannot again imprison him. *Comm. vs. Sheriff of Allegheny*, 1 Grant, 187. 4. A petitioner for the benefit of the insolvent law, whose application has been rejected, must surrender himself on the day of his rejection. A subsequent surrender is ineffectual, and an escape from it would not charge the sheriff with the debt. *Frick vs. Kitchen*, 4 W. & S., 30. 5. It is the duty of the sheriff to keep a defendant under a *ca. sa.* in safe and strict custody, and if he allows him to go at large for the shortest time, either before or after the return day of the writ, he is liable for an escape. It is no defence, that the prisoner voluntarily returned to the custody of the sheriff or was subsequently discharged under the insolvent laws. The attorney of the plaintiff may consent to the defendant's discharge from arrest, but his consent must be clear and positive. *Hopkinson vs. Leeds*, 78 Pa., 396. 6. In an action of debt on a sheriff's bond for an escape, evidence of the insolvency of the defendant at the date of sentence is immaterial and inadmissible. In an action on the case, however, the measure of damages is the actual loss which the plaintiff has sustained, and the insolvency of the defendant at the time of the escape may be shown. *Karch vs. Comm.*, 3 Pa., 269. *Shuler vs. Garrison*, 5 W. & S., 455. 7. The rule in civil as well as in

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criminal cases requires the sheriff to keep a prisoner taken under an execution in safe and strict custody ; and if he allow a prisoner to go at large for the shortest time without the plaintiff's consent, he is liable. The sureties of the sheriff are liable in such case without first fixing the principal. An action for an escape, is in debt, and not in tort. In civil cases, the sheriff may re-arrest after a negligent but not after a voluntary escape ; in criminal cases he may arrest after either. Insolvency of the prisoner under final process is not an answer by the sheriff to an escape. *Smith vs. Comm.* 59 Pa., 320. 8. In an action of debt against a sheriff for an escape from *ca. sa.*, the jury must find the whole debt and costs. *Green vs. Hern*, 2 P. & W., 167. *Scott vs. Seiler*, 5 W., 235. *Wheeler vs. Hambright*, 9 S. & R., 390. *Shewell vs. Fell*, 3 Y., 17. *Wolvertton vs. Comm.*, 7 S. & R., 273.

XV. NEGLECT TO DEMAND INTERPLEADER. It is not imperative upon the sheriff to demand an interpleader, where a third party claims property which the sheriff has seized under an execution. He may take the risk of returning *nulla bona*, or of proceeding to levy and sell. He may demand that the sureties in an interpleader bond reside in the county. *Comm. vs. Vandyke*, 57 Pa., 34.

XVI. NEGLECT TO ENDORSE WRIT. The omission by the sheriff to endorse the time of receiving an execution upon it, does not give priority to a subsequent execution, whereon the time is endorsed. Parol evidence is admissible to show the actual date of the receipt of an execution by a sheriff. *Hale's Appeal*, 44 Pa., 438.

XVII. NEGLECT TO EXECUTE WRIT. When a writ is delivered to the sheriff, he is bound to execute it according to the exigency thereof, without any inquiry into the regularity of the proceedings whereon the writ is grounded ; and, whether voidable or erroneous, such writ is a sufficient justification. A demand should be made on the sheriff before suing him. *Ricketson vs. Comm.*, 51 Pa., 157.

XVIII. NEGLECT TO LEVY. 1. A sheriff is not bound to

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levy upon personal property, alleged to belong to a defendant in an execution, upon an offer by the plaintiff to indemnify him. Such offer will not render the sheriff liable in damages, unless it appear in an action against him for a false return, that the property actually belonged to the defendant. *Comm. vs. Watmough*, 6 Wh., 117. 2. When a *fi. fa.* is placed in the sheriff's hands, unless he proceeds to levy and sell before the return day of the writ, he is, *prima facie*, liable for the amount of the debt, if the property levied on is equal in value to the debt endorsed on the execution, unless he show sufficient cause for the omission. *Dorrance vs. Comm.*, 13 Pa., 160. 3. A return of a levy on personal property, not within the view of the sheriff, and not taken into custody, is no levy as to subsequent judgment creditors. So also, if the sheriff be directed to proceed no further. *Lowry vs. Coulter*, 9 Pa., 349. 4. If two writs of *fi. facias* are delivered to the sheriff, he must execute first that which was first delivered to him. If by mistake or design, he levy goods by virtue of the writ last delivered, and make sale of them, the property in the goods is transferred by the sale, but the first execution creditor has his claim against the sheriff. *McClelland vs. Slingluff*, 7 W. & S., 135. 5. The issuing of an *alias fi. fa.* will not release the sheriff from liability incurred on the original *fi. fa.* Nor will the opening of the judgment in the case. *Myers vs. Comm.*, 2 W. & S., 60. 6. An action may be brought on a sheriff's official bond, immediately after he refuses to levy on property pointed out to him by the plaintiff in the execution, without waiting until the return day of the writ. *Shannon vs. Comm.*, 8 S. & R., 444. 7. The sheriff, in seizing goods, acts at his peril, and it would be a harsh doctrine to leave him unprotected, where he acts *bona fide*. Yet he must not, on shallow pretences, refuse to execute the writ. Where a claim of property is made by a third party, the sheriff has the right to call upon the plaintiff to reasonably indemnify him. *Spangler vs. Comm.*, 16 S. & R., 70. *Miller vs. Comm.*, 5 Pa., 297.

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XIX. NEGLECT TO MAKE RETURN OF WRIT OF EXECUTION. 1. In an action on a sheriff's official bond, the defendants are only liable for the damages actually sustained by the plaintiff in consequence of the failure of the sheriff to return a *fiери facias*, and default in selling the property seized. *Comm. vs. Allen*, 30 Pa., 49. 2. The omission by the sheriff to return an execution until after the return day, is not of itself such negligence as will make him liable in an action. *Comm. vs. Magee*, 8 Pa., 240. 3. The non-return of an execution, upon which the sheriff makes a sale, will not affect the validity of his conveyance. His deed may be considered a return, and a misrecital of the *vend. ex.* is open to correction. *Hinds vs. Scott*, 11 Pa., 19.

XX. NEGLECT TO PROPERLY NOTIFY. A direction to a sheriff given on Sunday to proceed with an execution is a nullity; the sheriff was not bound to receive or notice such an order on that day. *Stein's Appeal*, 64 Pa., 447.

XXI. NEGLECT TO PAY OVER MONEYS. 1. The return by the sheriff of a *fiери facias* will not prevent his receiving money from the debtor thereafter. He may sell on a *fi. fa.* after the return of his writ; hence payment to him is good to charge his sureties and release the debtor. *Beale vs. Comm.*, 7 W., 183. 2. A sheriff has no right to traffic off property and money in his hands by virtue of his office, which belong to other people. Although his sureties may be held liable, yet this does not prevent equity from following trust property as long as it can be identified, and reclaiming it for the benefit of those entitled. *Reed's Appeal*, 34 Pa., 207. 3. No matter if the sheriff runs away, or becomes insolvent, or indulges a purchaser, the defendant in the execution must not bear the loss. If the sheriff holds back the money, he is liable to the creditor for interest; if the purchaser delays payment, he may be resorted to for interest on his bid; if contending creditors keep the money in court, the defendant is not to suffer for this, for his property is gone. *Strohecker vs. Bank*, 6 W., 96. 4. The person who first sues on an official bond of a sheriff is

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entitled to have his judgment first paid. *Christman vs. Comm.* 17 S. & R., 381.

XXII. NEGLECT TO PAY INTEREST. A sheriff is not bound for interest on money collected by him on execution, until after demand made on him ; and a rule on him to pay the money into court, where a dispute exists among execution creditors, is not equivalent to such demand. *Hantz vs. Bank*, 21 Pa., 291.

XXIII. NEGLECT TO PAY MONEY INTO COURT. 1. A sheriff cannot relieve himself from liability for the proper distribution of the proceeds of real estate sold by him under an execution, in any other manner than by paying the proceeds into court. The mere payment by him to the prothonotary, without the intervention and knowledge of the court itself, is not such payment into court as will relieve him from liability. The proper course is for him to appear either in person or by attorney, and obtain the leave of the court to pay the money. He may then deliver it to the prothonotary. *Comm. vs. Walter*, 99 Pa., 181. 2. A court on whose execution a sheriff has sold lands and deposited the proceeds in bank, cannot, after his death, rule the bank to pay the money into court for distribution. The proper course is to rule the succeeding sheriff to pay it into court or to the plaintiff in the writ. *Allegheny Bank's Appeal*, 48 Pa., 328.

XXIV. NEGLECT TO PRESS EXECUTION. 1. It is the duty of the sheriff to make the money, according to the command of his writ, and he must disclose good reason for neglecting to perform this duty, otherwise the rights of creditors will be in great jeopardy. Ordinary care and diligence on the part of the sheriff will protect him from all risk. *Bank vs. Potius*, 10 W., 150. 2. When a sheriff has had a writ of *fieri facias* in his hands for several years without return, the presumption is that he has collected the amount. On the return day of this writ of execution, the sheriff may be called on by rule to return it, and if he neglect to do so without reasonable excuse, the court will grant an attachment against him. *Comm. vs.*

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McCoy, 8 W., 155. 3. Where a sheriff on a *feri facias* levies on personal property of the defendant sufficient to pay the writ, and neglects to sell; or neglects to levy when he could and should do so, whereby the property is lost, he is liable on his official bond and cannot amend his return to *nulla bona*. *Robinson vs. Anker*, 1 Foster, 179.

XXV. NEGLECT TO PRODUCE PROPERTY LEVIED UPON. A sheriff is absolutely liable for the forthcoming of property levied on by him under an execution, unless deprived of it by the act of God, sudden accident, such as fires, or the public enemy. If the goods be stolen between the levy and sale, the sheriff is responsible. *Hartleib vs. McLane*, 44 Pa., 510.

XXVI. NEGLECT TO RETAIN GOODS. 1. Where a sheriff negligently permits his goods to be removed, the plaintiff may bring his action against him without first issuing a *vend. ex. Comm.* *vs. Rowland*, 2 Delaware Co., 31. 2. *Prima facie*, the sheriff is liable for the whole amount endorsed on the execution, but he may show that by no diligence could he have collected that sum. If, without legal authority, he withdraw from and surrender the possession of goods levied upon by him under an execution, and make return to that effect, he thereby incurs a liability on his official bond, to the plaintiff in the execution. *Comm vs. Contner*, 18 Pa., 439.

XXVII. NEGLECT TO SELL GOODS LEVIED UPON. 1. It is the duty of a sheriff, when indemnified by a plaintiff in an execution, after levy, to sell the goods levied, or, if they be claimed by others, to apply for an interpleader, under the act of April 10, 1848, and it is irregular to return to the writ that the property was claimed by others who had given bond. *Connelly vs. Walker*, 45 Pa., 449. 2. When the sheriff makes a levy, and refuses to sell, the only remedy of the plaintiff in the execution is against the sheriff to the amount of the goods levied upon. *Hamner vs. Griffith*, 1 Grant, 193.

Sheriff's Deeds.

I. NEGLECT, BY WHICH LOST. After proof that diligent search and inquiry have been made for a missing deed, the record of its acknowledgment and of its contents is admissible. *Luce vs. Snively*, 4 W., 396.

II. NEGLECT IN ENTRY OF ACKNOWLEDGMENT. As the entry of acknowledgment of a sheriff's deed is equivalent to recording it, it is valueless if made in a court different from the one in which the execution issued. *Dehaven's Appeal*, 38 Pa., 375.

III. NEGLECT TO MAKE SEARCHES. A purchaser of real estate at sheriff's sale is protected against all unrecorded conveyances from the defendant in the execution, of which he had no notice. He is bound to look to the records and the state of the possession at the time when the sale was made, but not to the date of the sheriff's deed. *Stewart vs. Freeman*, 22 Pa., 120.

IV. NEGLECT TO ACKNOWLEDGE. If the late sheriff has acknowledged a deed defectively, his successor cannot execute a new deed; but the late sheriff may acknowledge it again, though out of office. *Adams vs. Thomas*, 6 B., 254. *Woods vs. Lane*, 2 S. & R., 53.

V. NEGLECT TO PRODUCE. The minute of the prothonotary of the acknowledgment of a deed by the sheriff is not evidence to prove the deed, if the non-production of it is in no way accounted for. A minute on the record is a mere abstract of the deed, and not a copy. *Lodge vs. Berrier*, 16 S. & R., 297.

VI. NEGLECT TO RECORD. 1. The acknowledgment of a sheriff's deed in open court, and the minute taken of it of record by the prothonotary, is a sufficient recording, within our recording acts; differing in this respect from other deeds, which, after acknowledgment before a judge, justice or other officer, must be recorded in the recorder's office of the proper county. *Naglee vs. Albright*, 4 Wh., 298. 2. If the deed has not been legally recorded, the error is cured by reading the registry thereof from the prothonotary's office. *Stonebreaker vs. Short*, 8 Pa., 155.

Sheriff's Sale.

I. NEGLECT BY IMPOSING TERMS. A sheriff has no right to impose terms of sale, on a *vend. ex.*, different from those which the law imposes. *Wood vs. Levis*, 14 Pa., 9.

II. NEGLECT BY INADEQUACY OF PRICE. 1. Mere inadequacy of price is in itself insufficient ground upon which to set aside a sheriff's sale, if the sale was in all respects regular, and no fraud is shown to have been practiced. *Cake vs. Cake*, 156 Pa., 47. *Gobright vs. Diffenbach*, 2 Lancaster Bar, No. 39. *Long vs. Miller*, 10 Pa. County, 586. *Union Bank vs. Bertolet*, 1 Woodward's Decisions, 88. 2. Mere inadequacy of price is not sufficient ground for setting aside a sheriff's sale. Where the inadequacy is very gross, and where no person interested can be harmed, the court may seize on any other matter of equity to set the sale aside. *Campbell vs. Williams*, 13 Luzerne Register, 185. 3. When inadequacy of price is relied upon as a reason for setting aside a sheriff's sale, there should be some guarantee or assurance given, that, on a re-sale, the property will sell for a greater sum than the bid of the purchaser. *Chartiers Coal Co., In re*, 1 Pittsburg, 87. 4. Mere inadequacy of price, where the proceedings were regular, will not suffice to set aside a sheriff's sale, even where a higher bid is offered. *Gantz vs. Carpenter*, 8 Lancaster Review, 286. *Long vs. Miller*, 9 *Idem*, 9. 5. When title to property sold at a sheriff's sale is obtained by a trick or fraudulent practice, the title is invalid. Where the inadequacy of price is very gross, the court will take advantage of any irregularity in the proceedings, however slight, to set aside the sale. *Labar vs. Snell*, 1 Luzerne Law Times, 75. 6. A court does not abuse its judicial discretion in setting aside a sheriff's sale where it appears that only \$195 were bid at the sale, where the application to set aside the sale is accompanied by an offer to bid \$1500, and it also appears that counsel for a mortgage creditor had neglected to bid under a mistaken impression that the mortgage would not be discharged. *Phillips vs. Wilson*, 164 Pa., 350. 7. Inadequacy of price alone is a sufficient reason for setting aside a sheriff's sale of land under an order

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of sale in proceedings in partition ; a fair price is necessary to a fair sale. Mere inadequacy of price, however, is not a sufficient ground for setting aside a sheriff's sale on an execution. *Simon vs. Simon*, 1 Miles, 404. *Tripp vs. Silkman*, 1 Luzerne Register, 175. *Bower's Appeal*, 6 Lancaster Bar, 58. *Aument's Estate*, 9 *Idem*, 189. *Herr vs. Adams*, 13 *Idem*, 59. 8. Gross inadequacy of price, when coupled with other equitable circumstances, may be ground for setting aside a sale. In the orphans' court, such inadequacy of price may, in itself, be ground to set aside the sale. *Welles vs. Davis*, 3 Kulp, 61. *Campbell vs. Williams*, *Idem*, 92. *Twells vs. Conrad*, 2 W. N., 30. *Ellis vs. Bleim*, *Idem*, 290.

III. NEGLIGENCE BY MISREPRESENTATIONS. Where a purchaser at sheriff's sale is seriously misled by the misrepresentations of the sheriff as to the amount of encumbrances against the property, the court will set aside the sale, but at the costs of the purchaser. *Finley vs. McCulley*, 2 Phila., 212.

IV. NEGLIGENCE IN ADJOURNING. A sale will be set aside, even after the acknowledgment of the sheriff's deed, where the plaintiff, being the highest bidder adjourned the sale, and then purchased the property at a lower rate. *Vaneman vs. Cooper*, 4 Clark, 37.

V. NEGLIGENCE IN ADVERTISING. 1. The act of June 16, 1836, requiring sheriffs' sales to be advertised once a week during three successive weeks previous to the sale, means three full weeks, of twenty-one days. *Barclay vs. Robb*, 5 Pa. County, 646. 2. The abstract in the *Legal Intelligencer* cannot be expected to afford all the details of the sheriff's hand-bill, and is not a cause for setting aside the sale. *Building Ass'n vs. Silvy*, 4 Phila., 17. 3. Under the act of June 16, 1836, which requires advertisement of a sheriff's sale once a week during three successive weeks, the advertisement need not be on the same day in each week. *Hollister vs. Vanderlin*, 165 Pa., 248. 4. Where a sheriff's advertisement erroneously described land, and twelve days before the sale corrected bills were posted in most of the places where the first bills had

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been, held, that the sale should be set aside. *Landis vs. Longenecker*, 6 Montgomery Co., 200. 5. Failure to comply with the strict requirements as to advertising sheriff's sales, will not cause the court to stay or set aside the sale where no injury results to the defendant's interests. *McDonnell vs. Winton*, 4 C. P. Reporter, 45. 3 Delaware Co., 199. 6. The requirements as to advertising a sheriff's sale are merely directory. The validity of the sale does not depend upon strict compliance with them. But the court will see that they are substantially followed. *McDonnell vs. Winton*, 4 Lancaster Review, 194. 7. Under the act of June 16, 1836, twenty-one days must intervene between the first advertisement of a sheriff's sale of real estate and the day of sale. *Smith vs. Fishing Co.*, 1 Delaware Co., 127.

VI. NEGLECT IN DATE. Under the act of April 16, 1845, all sales of real estate made by sheriffs shall be made on or before the return day of the writs, or within six days thereafter. *Kelly vs. Creen*, 53 Pa., 302.

VII. NEGLECT IN DESCRIPTION OF PREMISES. 1. A failure in the sheriff's advertisement to set forth the number of feet the property fronts upon a street, is not sufficient misdescription to be considered on a motion to set aside the sale. *Bear vs. Boeckel*, 5 York Record, 70. 2. Equity will not sanction a misdescription by a plaintiff of defendant's property, of which he shall reap the advantage, whether the inaccuracy is the result of mistake or design. *Carlin vs. Leng*, 1 Phila., 375. 3. An omission in the advertisement that the buildings were new, and had modern improvements, will not be cause to set aside a sale, where there is no suggestion that the property would bring more at a resale. *Dougherty's Case*, 16 Pa. County, 214. 4. A sheriff's sale of real estate of slight value, will be set aside where, in the advertisement, no notice appeared of a barn upon the premises, that being the only building upon them. *Ely vs. Schoener*, 1 Woodward's Decision, 73. 5. Where there is a material mistake in the description of property advertised to be sold by the sheriff, as by omitting to properly

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describe the buildings and other noticeable improvements, the sale on motion will be set aside. *Fire Ass'n vs. Johns*, 1 W. N., 74. *Barnes vs. Ellinger*, *Idem*, 309. *Building Ass'n vs. Mason*, *Idem*, 82. *Ass'n vs. Adams*, *Idem*, 144. *Sergeant vs. Schatzle*, *Idem*, 402. *Mole vs. Deamer*, *Idem*, 113. *Brown vs. Sheppard*, *Idem*, 103. *Wood vs. Boileau*, 16 W. N., 559. *Twells vs. Mulligan*, 2 W. N., 67. *Laird vs. McCarter*, *Idem*, 213. *Ellis vs. Bleim*, *Idem*, 290. *Whitaker vs. Birkey*, *Idem*, 476. *Agnew vs. Carlin*, *Idem*, 477. *Hansen vs. Byrne*, *Idem*, 290. *Van Dyke vs. Leeds*, 4 W. N., 139. *Trust Co. vs. Herr*, 14 W. N., 390. *Fry vs. Vetterlein*, 6 W. N., 83. *Thomas vs. Curren*, *Idem*, 432. *Neaffie vs. Conrad*, *Idem*, 303. *Wentz' Appeal*, 10 W. N., 284. *Comm. vs. Maxwell*, 2 Phila., 224. *Sheafer vs. Leiffe*, 6 Lancaster Bar, 78. 6. The description of the back-buildings that are not independent improvements, has never been required as essential. If there be a misdescription, the sale will be stayed. *Herr vs. Adams*, 2 York Record, 121. *Seipt vs. McFadden*, *Idem*, 88. 7. A building fitted up and used as a store property, should be described as such in the advertisement of the sheriff, and not merely as a "house." *Kingston vs. Hoffman*, 1 Montgomery Co., 57. 8. Misdescription of the premises in the sheriff's advertisements, failure to mention a valuable water power, together with the inadequacy of price, is sufficient ground to set aside a sheriff's sale. *Krause vs. Neidig*, 3 Montgomery Co., 132. 9. If there is a misdescription in the sheriff's advertisement, the sale will be stayed. In case of laches in applying to stay the sale, the party guilty of the laches must pay the costs caused thereby. *Seipt vs. McFadden*, 2 Schuylkill Record, 123.

VIII. NEGLECT IN DISTRIBUTION OF PROCEEDS. 1. A sheriff may, in the absence of any notice or rule to pay the money made from a sale of real estate in court, apply it to the liens entitled; he does so, however, on his own responsibility. Where doubt exists, his safety lies in paying the money into court. After the payment of all judgments entered or revived

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within five years, the fund does not go to the defendant, but to judgments over four years old. *Bastian, In re*, 1 **Kulp**, 1. *Brown's Appeal, Idem*, 240. 2. Under the act of April 10, 1862, the sheriff has no right to report a schedule of distribution of the proceeds of sale, except according to the list of liens on property sold as certified by the proper officers. *Campbell vs. McCleary*, 166 Pa., 1. 3. Upon the receipt by the plaintiff in a judgment of more money out of the proceeds of the sale of real estate than he is entitled to, an action cannot be maintained against him by the defendant, but should be brought in the name of the sheriff. *Longenecker vs. Zeigler*, 1 **W.**, 252.

IX. NEGLIGENCE IN INCLUDING WRONG PROPERTIES. 1. Where a sheriff's deed incorrectly recited that two frame barns were situate on the land sold and passed therewith, whereas they were situate on the adjacent tract of another party, the vendee is entitled to equitable relief; his remedy being to tender a reconveyance, and to sue for the rescission of the contract. *Babcock vs. Day*, 104 Pa., 4. 2. Where the lands of a plaintiff in an execution were by mistake included in the levy made on the lands of the defendant, and sold with them, the sheriff's vendee acquired no title thereto by the sale and sheriff's deed. *Hunter vs. Hulings*, 37 Pa., 307.

X. NEGLIGENCE IN LUMPING PROPERTIES. 1. Upon a sheriff's sale of land, the general rule prescribed by public utility is that different lots of ground shall be sold separately. Competition thereby is greatly increased; many persons might desire to purchase one, who would not or could not purchase several. The primary object of selling at sheriff's sale is not to transfer the title, but to collect the money. A common encumbrance creates no reason for selling the lots together. There are some exceptions to the rule. *Baker vs. Gas Co.*, 73 Pa., 120. *Smith vs. Fishing Co.*, 1 Delaware Co., 121. 2. Where the defendant has himself subdivided his land for the purpose of sale, and the subdivisions are separated by streets and alleys, each parcel should be sold separately, and if they are sold in a lump for an inadequate price, the court will set aside the sale.

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This is the case, even if they are subject to a common encumbrance. *Butler vs. Patrick*, 4 Lancaster Review, 401. 3. When real estate, consisting of several tracts, is sold at a lumping sale, a party who is present and bids on the property, thereby waives any objection to it. *Chartier's Coal Co., In re*, 1 Pittsburg Journal, 175. 1 Pittsburg, 87. 4. It is a general rule, that where the sheriff sells different parcels or houses together, the sale will be set aside. The court does not require it to appear that the price was inadequate. When inadequacy exists, the court will lay hold of any irregularity. *Connell vs. Hughes*, 1 Phila., 225. 5. A sheriff's sale of several distinct properties advertised as one, will be set aside; it is not sufficient that they be sold separately. *Hoeckley vs. Henry*, 3 Phila., 44. 6. Where properties are advertised by the sheriff to be sold separately, they cannot be sold as one property. *Norris vs. Adams*, 13, Phila., 111. *Eckman vs. Fautz*, 9 Lancaster Bar, 65. *Hughes vs. Calvert*, 5 W. N., 98. 7. The court disallows a lumping sale by the sheriff, where from the items of property he can make distinct sales. Any other course might lead to shameful sacrifices of property. There may be exceptions, but the purchaser must bring himself within them. *Rawley vs. Brown*, 1 B., 61. 8. Where the sheriff sells different parcels of houses together, the sale will be set aside. *Whitehouse vs. Stevens*, 2 Schuylkill Record, 342. 14 Lancaster Bar, 116. 3 York Record, 120. 9. A lumping sale of distinct properties at sheriff's sale is an inequality which will be cured by the acknowledgement of the sheriff's deed. *Wrigley vs. Whittaker*, 6 W. N., 420.

XI. NEGLECT IN MAKING. Where a sale has been made to an execution creditor in the absence of any other bidder or bystander, the presumption of collusion is conclusive. A sheriff's sale ought to be made where it has been advertised to be held, and if adjourned to another place, it should be selected with reference to a probable increase of bidders as to the nature or kind of the property to be sold. *Conniff vs. Doyle*, 8 Phila., 630.

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XII. NEGLECT IN NAME OF DEFENDANT. When property to be sold at sheriff's sale was advertised as belonging to Kipple, when the name was Kipple, this did not vitiate the sale, nor the fact that the property was described as a frame dwelling house and out-buildings, without mentioning what the buildings were, when the description did not mislead any person, especially as the objection was made late. *Miller vs. Kipple*, 2 Pearson, 118.

XIII. NEGLECT IN NAME OF PURCHASER. Where the sheriff, by a clerical mistake, returned to his writ that the name of the purchaser of the property was John L., and made and acknowledged the deed accordingly, when the real name was Joseph L., the court permitted the return and deed to be amended, and directed the sheriff to reacknowledge the deed. *Rapin vs. Dealy*, 1 Miles, 339.

XIV. NEGLECT IN REPRESENTATIONS AT SALE. Before the act of April, 1830, the purchaser of land at sheriff's sale took it clear of encumbrances, and the purchase money went to lien creditors according to priority. Where, at the time of a sale, the seller or any person present represents the title to be in a certain way, and it turns out not to be so, yet, as against the person making the representation, it shall be as represented. *Shultze vs. Diehl*, 2 P. & W., 273.

XV. NEGLECT IN SELLING GOODS IN BULK. 1. Sheriffs' sales of personal property in mass may be evidence of fraud, but they are not fraudulent *per se*. The law presumes that a public sale is made in good faith. There may be circumstances, that a sale of all the goods seized in execution, in the aggregate, may be proper and advisable. Much is left to the discretion of the sheriff. *Furbush vs. Greene*, 108 Pa., 503. 2. As a general rule in selling personal property under an execution, the sheriff should sell in parcels. There may be circumstances, however, when the sheriff, in the exercise of a sound discretion, may be justified in selling the goods as a whole. The object in every case is to realize the highest price. *Grim vs. Reinbold*, 148 Pa., 446. 3. It is the rule of this court to disallow a

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lumping sale by the sheriff in every case, where from the distinctness of the items of the property, distinct sales can be made. Any other rule would lead to the most shameful sacrifices of property. Within certain limits, however, the officer must exercise his own judgment. He is not bound in all cases to sell by the single article. He may, and often should, sell in lots and parcels, but he cannot sell in mass, entirely in bulk. A sale is not necessarily void, because the articles are not actually in view when sold. *Klopp vs. Witmoyer*, 43 Pa., 222. 4. A sheriff's sale of goods in the mass is not fraudulent *per se*, nor void in all instances. If the sale be thus conducted at the direction of the parties to the execution, and no one desiring to bid, requests that the sale be conducted otherwise, and the sale be in other respects fair, it is valid, and will pass a good title. *Smith vs. Meldren*, 107 Pa., 348.

XVI. NEGLIGENCE IN SELLING IN EXCESS OF DEBT. Where the sheriff is selling property by parcels, whenever he has sold enough to pay the debt, interest and costs of his writ, he ought not to sell any more. *Wallace's Estate*, 2 Pittsburg, 145.

XVII. NEGLIGENCE IN STATEMENTS BY SHERIFF. 1. Erroneous statements made by a sheriff, calculated to mislead, are sufficient cause to set a sale aside. *McEnroe vs. McCoy*, 2 Delaware Co., 379. 2. Where, at a sheriff's sale, the sheriff innocently misstated the amount of liens on a property, whereby a purchaser was misled, on application the sale was set aside. *McEnroe vs. McCoy*, 2 Northampton Co., 112. *Lehigh Valley Reporter*, 89.

XVIII. NEGLIGENCE IN WRIT. A sheriff's sale of lands without a *venditioni exponas* is void. *Porter vs. Neelan*, 4 Y., 108. *Glancey vs. Jones*, *Idem*, 212.

XIX. NEGLIGENCE OF AUTHORITY TO SELL. Where there is a clear want of authority in the sheriff to make a sale of real estate, his deed conveys no title to the purchaser. *Woltjen vs. O'Malley*, 1 Schuylkill Record, 245. 12 Lancaster Bar, 6.

XX. NEGLIGENCE OF BIDDER. 1. A purchaser at sheriff's sale, who practices any deceit, or is guilty of any trick for the

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purpose of obtaining the property at an under value, and does so obtain it for less than it is worth, renders the title so acquired void and worthless. *Abbey vs. Dewey*, 25 Pa., 416.

2. At the sheriff's sale of A's land, the latter arranged with B to buy it in for him, B to advance the money. At the sale, A and B informed bidders of this arrangement, which resulted in a cessation of bidding, and B bought the land. Held, that B took as trustee for A. *Cook vs. Cook*, 69 Pa., 443.

3. Where one becomes a purchaser of land at sheriff's sale, under an erroneous belief that the lien of a mortgage will be discharged by the sale, and discovers the mistake before the deed is acknowledged, the court can grant relief. Ignorance of the law is usually no ground of relief from the obligation of a contract. But where the contract is made with the court itself, which has represented, under circumstances like the present, that the land would be discharged of all encumbrances by the sale, the purchaser acting on the faith of such decision should be relieved. *Cumming's Appeal*, 23 Pa., 509.

4. A bidder at sheriff's sale may retract his bid before the property is struck down to him, and the sheriff cannot prescribe conditions to the contrary. *Fisher vs. Seltzer*, 23 Pa., 308.

Faunce vs. Sedgwick, 8 Pa., 408. 5. Where the sheriff's vendee pays part of the purchase money on the day of sale, but fails to pay the residue, the sheriff may return the land unsold, and on a resale, is generally liable for the difference, if it bring a less sum. *Wright's Appeal*, 25 Pa., 374. *Forster vs. Hayman*, 26 Pa., 266.

6. The legal inference of a promise to pay was from the bid, the failure to pay was the breach, and the difference between the bids at the first and second sale was evidence as to the measure of damages. It was at the election of the sheriff to put up the property again for sale, and to sue the first bidder for damages. *Funk vs. Smith*, 66 Pa., 27.

7. Where property is knocked down to a bidder at a sheriff's sale, and he is not called upon to perform his contract, and no notice that he will be held responsible for a loss on a resale, he cannot be held for the difference. *Girard Ins. Co. vs. Young*,

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8 Phila., 16. 8. A sheriff may sue a bidder, who neglects to take the property purchased by him. On a resale, he is not bound to give the first purchaser notice of the time and place of the second sale. It is sufficient to notify him, that unless he pays the money bid, it will be resold. *Gaskell vs. Morris*, 7 W. & S., 32. 9. A defaulting purchaser at a sheriff's sale of real estate is not liable to respond in damages for loss on resale of the property, if it appears that under the former sale he would have acquired a more valuable title than that which passed to the purchaser at the latter sale. *Hare vs. Bedell*, 1 Penny-packer, 392. 98 Pa., 485. 10. When a purchaser of land at sheriff's sale, by false representations prevents competition in bidding, and thereby gets the land cheap, he gets no title. *Hogg vs. Wilkins*, 1 Grant, 68. 11. An action against a bidder at sheriff's sale for the difference between the amount of his bid, and the price at which the land was struck down at a subsequent sale, must be brought either in the name of the sheriff, on the privity of contract, or in the name of some one injured. The sheriff, after the return day of the writ, may sue a bidder without having first tendered him a deed. *Holdship vs. Doran*, 2 P. & W., 12. *Freeman vs. Husband*, 77 Pa., 389. 12. Where a person has been guilty of actual fraud at a sheriff's sale, he is not entitled to be reimbursed the price he has paid for the property for which he bid. It would be fraud for a bidder to buy at an undue price, by falsely asserting that he was buying the property for the benefit of the family of the defendant in the execution, and falsely pretending the purchaser would buy it subject to certain liens, which he knew the sale would divest. *McCaskey vs. Graff*, 23 Pa., 324. *Dick vs. Cooper*, 24 Pa., 217. 13. To invalidate a sheriff's sale, it must be proved that the purchaser was guilty of actual fraud, such as making false representations, or practicing some trick or device, and thereby procuring the title for less than its value. *Sharp vs. Long*, 28 Pa., 433. 14. A bidder at a sheriff's sale of real estate is in default in not paying the purchase money within the ten days allowed by the terms of sale. *South vs. Leavins*,

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6 W. N., 528. 15. The plaintiff in an execution refusing to comply with his purchase of the real estate, is liable for a loss on a resale, and cannot set up the defective description in his levy as a defence. *Spang vs. Schneider*, 10 Pa., 193. 16. The rule of *caveat emptor* applies with such strictness to a purchaser at sheriff's sale, that he is bound to pay the purchase money, although he may discover the title to be worthless. He is bound to look to the possession and the records. He is protected from all unrecorded conveyances of which he had no notice. *Stewart vs. Freeman*, 22 Pa., 123. 17. Where there has been a fraud committed in obtaining property at a sheriff's sale, and the purchaser at said sale was not a party to it, his vendee will take a good title, although the latter had notice or knowledge of the fraud. *Stewart vs. Reed*, 91 Pa., 287. 18. Where a party at sheriff's sale fails to comply with his bid, and the property is subsequently sold to another bidder, the difference between the bids is *prima facie* the measure of damages. The first bidder cannot take advantage of irregularities in the execution under which the sale was made, nor that the purchaser at the second sale paid no portion of his bid to the sheriff, but gave a credit therefor on his mortgage lien. *Tindle's Appeal*, 77 Pa., 201. 19. Notice was given at a sheriff's sale of certain terms, upon the non-compliance of which by the purchaser, the property would be resold at a subsequent day, and the purchaser at the first sale be held liable for any deficiency. In an action brought to recover the price bid, held, that the sheriff could recover, though the property was not again put up for sale, if the purchaser by his conduct waived the putting up of the property a second time. *Ward vs. Fife*, 29 Pittsburgh Journal, 328. 20. Where a purchaser of land at public sale fails to comply with the conditions of sale, he can only be held liable for the deficiency in price caused by a second sale, when the conditions of the second sale are the same or not more onerous than those of the first sale. *Weast vs. Derrick*, 100 Pa., 509. 21. A judgment may be obtained by a sheriff against a non-complying

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bidder for the difference of his bid and what the property brought at a subsequent sale. *Whitaker vs. Peck*, 2 Lancaster Review, 22. 22. Where a sheriff elects to resell on default of the first purchaser, and the property brings less than at the first sale, he can sue such purchaser for the difference. *Keim vs. Neafie*, 16 W. N., 46. *Robinson's Estate*, 6 W. N., 352. *Leeds vs. Seery*, 2 W. N., 223. 23. The gist of the action against a bidder at a sheriff's sale, where the bid is not complied with, is a breach of contract. *Whittaker vs. Thompson*, 12 Luzerne Register, 21.

XXI. NEGLECT OF A DEPUTY. Where a deputy sheriff purchases property at a sheriff's sale, and there is no fraud, the owner of the property may disaffirm the sale, but must repay the purchase money paid. *Jackson vs. McGinness*, 14 Pa., 331.

XXII. NEGLECT OF FAIRNESS. The court has power to set aside a sheriff's sale, where there was such irregularity or fraud as to have produced a sacrifice of the property to the prejudice of any party interested. In such cases, it is not necessary that the purchaser of the property was a party to the fraud. *Moyer vs. Nichol*, 1 Schuylkill Record, 55.

XXIII. NEGLECT OF INQUISITION. 1. A sale of land under a *fi. fa.* without inquisition or waiver of inquisition, is wholly unauthorized. A void sale is not confirmed by a distribution of its proceeds amongst the judgment creditors of the debtor. *Gardner vs. Sisk*, 54 Pa., 506. 2. A defendant, whose real estate is sold by the sheriff without condemnation or waiver of inquisition, must object before the confirmation of the sale and the acknowledgment of the deed to the purchaser. *Spragg vs. Shriver*, 25 Pa., 282. *McFee vs. Harris, Idem*, 102. 3. A sale of real estate on a *fi. fa.* without a waiver of inquisition is without authority and void, and is not confirmed by the acknowledgment of the sheriff's deed and distribution of the proceeds. The acknowledgment of a sheriff's deed cures irregularities in process or proceedings, but not want of authority to sell. *St. Bartholomew's Church vs.*

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Wood, 61 Pa., 96. 4. The want of an inquisition and condemnation can be taken advantage of only by the defendant in the execution, and by him only within a reasonable time.

Wray vs. Miller, 20 Pa., 111.

XXIV. NEGLECT OF KNOWLEDGE OF LIENS. 1. Where a bidder at sheriff's sale purchases under the erroneous belief that the sale will discharge the lien of purchase money due on the land sold, courts will grant relief if the deed has not been acknowledged nor the purchase money paid. Provided, however, that other parties will not be injured thereby. *Vincent vs. Hunsinger*, 7 Pa. County, 331. *McEnroe vs. McCoy*, *Idem*, 431. 2. Where a bidder at a sheriff's sale purchases under the erroneous belief that all liens would be discharged by the sale, and had not actual notice that the property would be sold subject to certain mortgages, the court will set aside the sale on the bidder's payment of the costs of sale, if others interested do not suffer in consequence. *Fry vs. Patrick*, 10 Lancaster Review, 352.

XXV. NEGLECT OF NOTICE. 1. A sheriff's sale must be public and on notice required by law. All arrangements for a private sale under execution tend to fraud and are against public policy. *Pierce vs. Evans*, 61 Pa., 415. 2. The act of June 16, 1836, requires the first notice of the sale of real estate to be at least twenty-one days before the day of sale. *Erie Savings Fund vs. Thompson*, 13 Phila., 511. *Yocum vs. Specht*, 1 W. N., 6. 3. The act requiring six days' notice by the sheriff of a sale of personal property, the time cannot be reduced by agreement between the sheriff and the defendant to the prejudice of a second execution creditor. *Gibbs vs. Neeley*, 7 W., 305.

XXVI. NEGLECT OF NOTICE OF CLAIM. The mere omission of an owner or claimant of property, seized on the debt of another, to give notice of his claim on the day of sale, will not defeat his right to recover in an action against the officer, when the claimant was not present at the sale, and

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had not been notified by the officer of the seizure of his property. *Harris vs. Stevens*, 4 Lancaster Bar, No. 24.

XXVII. NEGLECT OF NOTICE OF ADVERSE CLAIMS. The sheriff is not the agent of the purchaser at the sale. It is the interest of all parties, creditors and debtors, to protect *bona fide* purchasers at sheriff's sale. A purchaser at such sale, other than the plaintiff, is not affected by the irregularity of the proceedings. No wise man would buy at the sale, if he was to be affected by notice of adverse claims, not publicly communicated at the time of the sale to bidders, though made known to the sheriff. Notice to the sheriff is not notice to him. *Stahle vs. Spohn*, 8 S. & R., 317.

XXVIII. NEGLECT OF NOTICE OF DEFECT OF TITLE. The nature of a sheriff's sale is a sale of the defendant's title. The sheriff enters into no covenant. Inadequacy of price alone is no objection to such sale. The rule of *caveat emptor* is binding on every purchaser at sheriff's sale. A sheriff's sale cannot be objected to by the purchaser merely on the ground of defective title. *Friedly vs. Scheetz*, 9 S. & R., 156.

XXIX. NEGLECT OF OPPORTUNITY TO INSPECT GOODS. Where, in a sheriff's sale of personal property, inadequate opportunity was allowed for the inspection of the goods, and the same were sold in large and unassorted lots, the sale will be set aside. *Wolf vs. Hano*, 1 Pa. Dist., 700.

XXX. NEGLECT OF PRESENCE OF BIDDERS. 1. There can be no public sale where there are neither bidders nor bystanders, except the execution creditor himself. In such case, the sheriff should adjourn the sale. *Conniff vs. Doyle*, 2 Luzerne Register, 107. 2. A sheriff's sale of personal property will be set aside, when it appears that there were no bidders or bystanders, except the plaintiff himself. Such a sale will be regarded as collusive. *Wharmby vs. McNertney*, 4 Kulp, 101. 3 Delaware Co., 8. Lehigh Valley Rep., 312. 2 Montgomery Co., 157.

XXXI. NEGLECT OF PURCHASER. 1. If a purchaser at a sheriff's sale has been guilty of some falsehood or trick before

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or at the time of the sale resulting in his obtaining the property for less than it otherwise would have brought, he does not obtain a good title; and such a title may be defeated by a subsequent sale of the property on the judgment of another creditor. *Barton vs. Hunter*, 101 Pa., 406. *Phillips vs. Hull, Idem*, 567. 2. A parol promise to purchase at a sheriff's sale, for the benefit of the defendant in the execution, will not constitute the purchaser a trustee for him, unless the purchase was made with the money of the defendant. A trust in lands cannot be established by parol evidence without writing. *Barnet vs. Dougherty*, 32 Pa., 371. *Kellum vs. Smith*, 33 Pa., 158. *Kauffman vs. Fahl*, 1 Schuylkill Record, 305. *Miller vs. Billman, Idem*, 154. *Schumacher vs. Winty, Idem*, 166. *Faust vs. Faust, Idem*, 248. 3. In several cases it has been held, that a promise to purchase at sheriff's sale for the benefit of another will not constitute the purchaser a trustee, unless the purchase be made with the money of the party seeking relief. Payment of the purchase money at the time title is acquired, or fraud in obtaining title, is requisite to raise a resulting trust. *Burkhardt vs. Schmidt*, 10 Phila., 118. *Dollar Savings Fund vs. Bennett*, 1 W. N., 66. *Soby vs. Pastello, Idem*, 274. 4. Where a parol contract for the purchase of lands has been carried on *mala fide*, there is a resulting trust and equity will decree a conveyance. Equity will not permit one to hold a benefit which he has obtained by fraud, either of himself or another. *Boynton vs. Housler*, 73 Pa., 453. 5. The simple avowal by a purchaser at sheriff's sale, whether made at the time of the purchase or afterward, that the purchase was made for another, will not support the allegation of a trust. *Carhart's Appeal*, 78 Pa., 110. 6. Where a bidder at sheriff's sale was guilty of false and fraudulent representations, in stating that he was buying the property for the family of the defendant, whereby he induced persons not to bid, and procured the property himself at much less than it was worth, or that it would otherwise have sold for, he is a *trustee ex maleficio*, and upon reimbursement for the amount expended, he may on

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refusal to reconvey the property to the defendant, be liable in an action of ejectment. *Christy vs. Sill*, 95 Pa., 380.

7. A mere naked verbal agreement by a purchaser at sheriff's sale, with his own money, that he will hold the premises in trust for the defendant, neither vests any equitable estate in the defendant under the statute, which prohibits parol declarations of trust, nor does it give any ground for an action, being a mere *nudum pactum*. *Dollar Savings Bank vs. Bennett*, 76 Pa., 406.

8. Where artifice or tricks are resorted to to procure property at a sheriff's sale at an under value, the purchaser takes as trustee *ex maleficio* for the person misled. *Faust vs. Haas*, 73 Pa., 301.

9. A purchaser at a sheriff's sale, who has paid the purchase-money, can only be held to be a trustee, on the ground of fraud; in which event he is a trustee for the creditor and for the debtor also, unless he be *particeps criminis*. *Haines vs. O'Connor*, 10 W., 313.

10. It is established law in Pennsylvania, that whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty, as it always is, with a purchaser, and would lead to the discovery of the requisite fact by the exercise of ordinary diligence and understanding. Mere rumors, it is true, do not amount to notice, but an announcement by an officer at a public sale of property is more than a rumor. Every purchaser at a sheriff's sale should examine the record, and he cannot build up an estoppel by his own default. *Hill vs. Epley*, 31 Pa., 331.

11. The court set aside a sheriff's sale of real estate, because the purchaser knew facts which, if made known, would have had an influence on the sale, and concealed them from others who attended. *Hutchinson vs. Moses*, 1 Browne, 187.

12. A purchaser at sheriff's sale who makes fraudulent statements as to fixed encumbrances upon the property to be sold, whereby others are dissuaded from bidding, and obtains it for less than its value, is guilty of fraud, for which the court may set aside the sale. *Jackson vs. Morter*, 82 Pa., 291.

13. Where a party agreed with the defendant in an execution to advance the money and to buy in the

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property for the use of defendant, and to reconvey to him the property upon being reimbursed for his outlay, the agreement is helped by proof that the purchaser dissuaded persons from bidding at such sale on the ground of his agreement, and thereby obtained the property at a sum much below its value. Where the verdict of the jury establishes both the contract and the bad faith, damages may be awarded by them. *Kellam vs. Kellam*, 94 Pa., 225. 14. A parol agreement made by a purchaser at a sheriff's sale to reconvey the property to the defendant in the execution, is within the statute of frauds, and cannot be enforced. The breach of such an agreement will not make the purchaser a trustee *ex maleficio*. *Kistler's Appeal*, 73 Pa., 393. 15. A parol agreement by a purchaser of real estate at a sheriff's sale, to hold the same and to convey it to the defendant in the execution whenever he shall repay to the purchaser his advances, does not raise a resulting trust enforceable within the act of April 22, 1856, unless fraud is clearly shown to have been perpetrated upon the defendant in the execution at the time of the sale. In such case only can a trust *ex maleficio* arise. *Kraft vs. Smith*, 20 W. N., 233. 16. Where a purchaser at sheriff's sale was guilty of actual fraud in representing that he intended to buy the property for the benefit of the family of the defendant in the execution, and misstated the encumbrances thereon, to deter other persons thereby from bidding, the plaintiff, in an ejectment action can recover without tendering the purchase money. *McCaskey vs. Graff*, 2 **Pittsburg Journal**, 54. 17. If a purchaser at sheriff's sale agrees with the defendant in the execution, that he will convey him the property upon being reimbursed for all the money he has expended, such an agreement is perfectly lawful and no evidence of fraud. *Mead vs. Conroe*, 113 Pa., 220. 18. Where one purchases at sheriff's sale in trust for another, and thereby prevents others from bidding, a trust arises *ex maleficio*, and the case is excepted out of the statute of frauds. *Norris vs. Knox*, 1 **Pittsburg**, 56. 19. Where a purchaser at sheriff's sale obtains

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property by means of a confidence reposed in him, he will be converted into a trustee *ex maleficio*. *Miller vs. Billman*, 8 Luzerne Register, 331. 1 Schuylkill Record, 154. *Kauffman vs. Fahl, Idem*, 305. *Schumacher vs. Winty, Idem*, 166. *Faust vs. Faust, Idem*, 248. 20. Where a judgment creditor at a judicial sale prevents others from bidding, by representing that he purposes to buy the property in, reimburse himself from the profits thereof, and then hand it over to the defendant, it is for the jury to say whether the statement and promises made by him were false or true. If false, his conduct was fraudulent and the sale was void. *Oram vs. Rothermel*, 98 Pa., 301. 21. An arrangement with a purchaser at sheriff's sale, that the sale shall be for the benefit of the defendant in the execution, does not of itself make the sale void. It is voidable by any creditor defrauded, but is good between the parties. *Pentz vs. Clark*, 100 Pa., 446. *Heath's Appeal, Idem*, 1. 22. It will not do to allow a purchaser to make what representations he pleases at an official sale, in order to cheapen the property, and then, after he has obtained the property on his own terms, permit him to shelter himself from his own fraud under the technical rules applicable to such sale. He who buys property at an official sale through a trick or misrepresentation, must not expect to hold it through the help of the courts. *Power vs. Thorp*, 92 Pa., 351. 23. It is the duty of a purchaser at a sheriff's sale to see that the authority to sell exists. Where the record showed that there was no legal service of the writ on the registered owner, without which the sale was void, he had notice that the sale was unauthorized. *Simons vs. Kern*, 92 Pa., 455. 24. A man who buys a worthless title at a sheriff's sale, and pays for it, or is allowed a credit on his lien, has no standing to repudiate the transaction subsequently. The rule in sheriff's sales is *caveat emptor*. *Wells vs. Van Dyke*, 106 Pa., 115. 25. Where one having a *bona fide* claim, whether valid or not, to a piece of land, is induced to confide in the verbal agreement of another that he will purchase the land at sheriff's sale for the benefit of the former, and

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as a result obtains the legal title to the same, his denial of the confidence is such a fraud as will make him a trustee *ex maleficio*. *Heath's Appeal*, 100 Pa., 1. *Blaich vs. Bixenstein*, 2 W. N., 301. *Wolford vs. Herrington*, 1 Foster, 342. 74 Pa., 311. 86 Pa., 43. 5 W. N., 260. 26. A parol agreement with a person having an interest in the property sold at sheriff's sale, that the purchaser will buy the property for the person having such interest, is binding and may be enforced as a trust. *Cowperthwaite vs. Bank*, 5 Luzerne Law Times, N. S., 79.

XXXII. NEGLECT OF PURCHASER OF CHATTELS. 1. Retention of possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud, the sale being the act of the law, not of the person retaining. A judicial sale is deemed to be fair till proved to be otherwise. A chattel purchased at a judicial sale may be left in the possession of the former owner on a contract of bailment. *Craig's Appeal*, 77 Pa., 448. 2. Personal property bought at a judicial sale may be left with the defendant under a contract of bailment; it may be hired or loaned with safety; but if sold or given, the purchaser cannot maintain trespass for taking it. *Waldron vs. Haupt*, 52 Pa., 408.

XXXIII. NEGLECT OF PURCHASER TO AFFIRM LEASE. A purchaser at sheriff's sale may either affirm or disaffirm an existing lease of the premises; by affirming it, he may claim the rent payable under it; but if he choose to disaffirm it, which he does by giving the tenant notice to quit, he cannot claim under the lease. *Bank vs. Ege*, 9 W., 436.

XXXIV. NEGLECT OF PURCHASER TO TAKE POSSESSION. A defendant in an execution whose land has been sold at sheriff's sale, is entitled to retain possession between the date of the sale and the acknowledgment of the sheriff's deed to the purchaser, and to enjoy during that period the ripening crops, if he severs them, and the use of open mines or oil wells. *Hardenburg vs. Beecher*, 104 Pa., 20.

XXXV. NEGLECT OF SHERIFF. 1. Where a sheriff, at a

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property by means of a confidence property, not in sight, but converted into a trustee *ex male*, the sale, he makes a per-Luzerne Register, 331. 1 Sch damages if he fails to fulfil it. vs. *Fahl, Idem*, 305. *Schum*, Pa., 462. 2. In the absence of vs. *Faust, Idem*, 248. 2^d *aff*, a sheriff may sell on a writ of *fi* judicial sale prevents ot^h not bring their value. If the plaintiff he purposes to buy r^h might have himself been their purchaser. the profits thereof, *good*, as to a sale under a *vend. ex.* is for the jury to *guard* for the defendant's interests, the sher- by him were fal *authorized* to postpone a sale, where otherwise and the sale *and be* palpably sacrificed, is another question. 21. An arr *mm.*, 6 W., 496. 3. A purchaser at sheriff's sale shall nothing more than purchase, is not responsible does n even though the seizure and sale be tortious. He credit *trespasser* by relation. So also when the sheriff vs. *possession* to the purchaser. The remedy in such wi *detinue*, replevin in the *detinet*, or trover after a demand *and refusal*. *Talmadge vs. Scudder*, 38 Pa., 517. 4. The *sheriff* is not the agent of the plaintiff in the execution, who *is not* responsible for misrepresentations of title made by the *sheriff* at the sale, unless he so instructed him. *Weidler vs. Bank*, 11 S. & R., 134.

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XXXVII. NEGLECT TO ACKNOWLEDGE DEED. Where real estate was sold by a sheriff, but the deed to the purchaser was not acknowledged for a year, a subsequent purchaser of the same land under a second execution within the year takes no title, although he has recorded his deed before the

of the deed of the previous purchase, Pa., 277.

NEGLECT TO ADVERTISE. 1. The act of June 1836 requires that a sheriff's sales of real estate to be advertised during three successive weeks previous to the sale, and that the advertisement be published in some newspaper or other public place near where the sale takes place nine days before the first publication. Such a sale will be set aside if not so advertised. *Clark vs. Robb*, 20 Phila., 426. *City vs. Scott*, 1 Pa., 42. *Caldwell vs. Hickman*, 3 W. N., 259. 2. A sheriff's sale on a *levari facias* must be advertised three weeks, once a week. *Good vs. Maule*, 8 Pa. County, 624. 3. The act of making such advertisements is the duty of the sheriff; it is a matter merely directory; and unless an actual injury has been sustained by an omission, it should not affect the title of a *bona fide* purchaser. *Weitzell vs. Fry*, 4 D., 218. 4. An exact adherence to the laws can alone divest the title to lands, on a sale for non-payment of taxes. The regular advertisements of the commissioners must be fully and clearly proved. The law makes it an indispensable preliminary. *Wister vs. Kammerer*, 2 Y., 200.

XXXIX. NEGLECT TO BID. 1. If a purchaser at sheriff's sale prevents the bidding, by fraudulently promising to protect other creditors if they would not bid, it avoids the sale and leaves the property open to seizure by another creditor. *Johnson vs. Oberholtzer*, 1 Walker, 103. 2. A contract not to bid at a sheriff's sale, so as to defraud the defendant in the execution, or his creditors, will be declared void, but where an agreement is made between certain judgment creditors, that one of their judgments will be provided for if the holder thereof will not bid at sheriff's sale, and this agreement is known and assented to by the defendant and all of his creditors affected by the sale, such agreement will be enforced. *Maffel vs. Ijams*, 103 Pa., 266. 3. If, by the fraudulent misrepresentations and deceit of the defendant, the plaintiff was prevented from bidding up the property at a sheriff's sale to an amount sufficient to cover his judgment, while he would

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have no remedy in equity, he could maintain an action on the case therefor. *Winter's Appeal*, 61 Pa., 313.

XL. NEGLIGENCE TO CLAIM TITLE. One who stands by and sees his property sold at sheriff's sale as the property of another person, without giving notice of his title, will thereby be barred from recovering it in ejectment. *Epley vs. Witherow*, 7 W., 163. *Carr vs. Wallace*, *Idem*, 394. *Chapman vs. Chapman*, 59 Pa., 214. *Young vs. Babilon*, 91 Pa., 283.

XLI. NEGLIGENCE TO DELIVER GOODS. No presumption of fraud arises from the retention of chattels by the defendant in an execution after a sheriff's sale of them. There is a distinction between judicial and private sales in this respect. *Sharp vs. Publishing Co.*, 2 Pa. County, 620.

XLII. NEGLIGENCE TO DEMAND PAYMENT FOR GOODS SOLD. The sheriff need not accept the receipt of an execution creditor in payment of personal property bought by him at a sheriff's sale. *Wilson vs. Printing Co.*, 4 W. N., 13.

XLIII. NEGLIGENCE TO DISTRIBUTE PROCEEDS. It is the sheriff's duty to distribute the proceeds of the sale of personal property, and he has no authority to pay the money into court, unless an order is made to that effect. *Marble Co. vs. Burke*, 12 Phila., 302.

XLIV. NEGLIGENCE TO EXAMINE RECORDS. *Caveat emptor* is the rule at sheriffs' sales. It is the duty of the buyer to look at the records before he bids, or he will be affected by all defects of which such inspection would have informed him. *Kuntz vs. Schumaecher*, 4 Pa. County, 515.

XLV. NEGLIGENCE TO EXAMINE TITLE TO LAND. Anything that would put a prudent man upon inquiry has been held equivalent to notice. It is not easy to define what circumstances should have this effect. Recitals in the title of the vendor, or discrepancies, or possession of the premises, and the like, have, in turn, often been held sufficient to put a party upon inquiry. But rumors are neither notice nor the ground-work for the required inquiry. Actual notice must be by direct information from a person who has an interest in the

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estate or who may be affected by the purchase. Notice from an unauthorized party, or one having no interest, is mere rumor. *Churcher vs. Guernsey*, 39 Pa., 86.

XLVI. NEGLECT TO INQUIRE INTO LIENS. 1. Where a bidder at a sheriff's sale purchases under the erroneous belief that all liens would be discharged by the sale, and such bidder had no actual notice that the property would be sold subject to certain mortgages, the court will set aside the sale if others interested do not suffer in consequence. *Fry vs. Patrick*, 13 Pa. County, 297. 2. In a sheriff's sale the rule of *caveat emptor* applies when there have been no misrepresentations or fraud practised, even where the purchaser has acted under an erroneous belief as to the amount of the liens subject to which the property was sold. *Laflin Powder Co. vs. Scholtes*, 1 Schuylkill Record, 129.

XLVII. NEGLECT TO MAKE A RETURN. 1. Where land is sold by the sheriff upon a writ of *vend. ex.*, the want of a return will not invalidate the sale. The omission is supplied by an acknowledgment of the deed in open court, reciting the sale. *Gibson vs. Winslow*, 38 Pa., 49. 2. The return of the *venditioni exponas* long after the acknowledgment of the sheriff's deed, though a censurable negligence, will not affect the validity of the title of the purchaser at a sheriff's sale. *Smull vs. Mickley*, 1 R., 95.

XLVIII. NEGLECT TO NOTICE ENCUMBRANCES. To give notice of encumbrances, which appear of record, is no part of the sheriff's business. The sheriff is neither competent to determine that matter, nor responsible for the truth of his information. *Reigle vs. Seiger*, 2 P. & W., 344.

XLIX. NEGLECT TO NOTIFY DEFENDANT. 1. When the sheriff neglects to notify the defendant of the prospective sale of his property, as required by the act of June 16, 1836, the sale will be set aside. *Fitzsimmons vs. Fitzsimmons*, 2 York Record, 121. *Mayer vs. Spangler, Idem*, 154. 2. The relation of landlord and tenant is a confidential one, and it is inequitable for a tenant, who is also a lien creditor, to issue

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execution and buy the property in at sheriff's sale without notice to his landlord. *Matthews' Appeal*, 104 Pa., 444-3. The sheriff is not bound to give a defendant written notice of an intended sale of his real estate. *Passmore vs. Gordon*, 1 Browne, 320.

L. NEGLECT TO PAY OFF LIENS. When the sheriff makes a sale of real estate, he is bound to appropriate the fund in discharge of the liens in the order of priority, or pay the money into court. A private sale of the land will not divest liens. *Foulke vs. Millard*, 108 Pa., 235.

LI. NEGLECT TO POST HANDBILLS. 1. Handbills printed from the same type as the notices in the newspapers, are not handbills in the sense of the statute. Omitting to designate the locality of the land sold, is a neglect of the statute. *Jayne vs. Storm*, 2 Lackawanna Jurist, 103. 2. Where handbills advertising a sale have not been posted by the sheriff, it is a ground for setting aside the sale, especially where gross inadequacy of price is also alleged. *McNutt vs. Levan*, 1 W. N., 130. *Brown vs. Lodge*, *Idem*, 443. *Groom vs. Overbeck*, 2 W. N., 272. *Penna. Co. vs. Conrad*, *Idem*, 476. *Wilcox vs. Dows*, *Idem*, 611. 3. Negative testimony, that no notices were posted on the premises advertised for sale by the sheriff, given by persons who would have been likely to see them, and where the defendant had no actual notice of the sale, and where the return is silent as to the posting of such notice, if uncontradicted, will set aside the sale. *Wells vs. McCarragher*, 9 Luzerne Register, 113.

LII. NEGLECT TO PRESS. A sale of personal property by a constable upon an execution, gives a good title to the purchaser, although the same property had been levied by a prior execution from the sheriff. *Duncan vs. McCumber*, 2 W. & S., 264.

LIII. NEGLECT TO PROPERLY ACKNOWLEDGE DEED. If a purchaser at sheriff's sale accept a deed, and keep possession of the property, he cannot, when sued for the purchase money,

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object that the acknowledgment was defective. *Scott vs. Greenough*, 7 S. & R., 197.

LIV. NEGLECT TO SELL ON DAY ADVERTISED. A sale of lands after the return day of the *venditioni exponas*, is not void, if the lands were advertised for sale on a day before, and the sale was continued by adjournment. *Burd vs. Dansdale*, 2 B., 80. *McCormick vs. Meason*, 1 S. & R., 92.

LV. NEGLECT TO SET ASIDE. 1. The court of common pleas has the power to set aside a sheriff's sale at any time before the deed is acknowledged, or even after that act, if done at the same term. *Connelly vs. Philadelphia*, 86 Pa., 110. 2. After the acknowledgment of a sheriff's deed, the sheriff's sale will not be set aside for mere inadequacy of price. The acknowledgment of a sheriff's deed cures irregularities. Were this rule to be relaxed, titles might be imperiled. *Cooper vs. Wilson*, 96 Pa., 409. 3. Application to set aside a sheriff's sale of personal property should be made before the goods are delivered to the purchasers, and be at the instance of a party interested, as prescribed by the act of April 10, 1849. *Dateman vs. Trine*, 2 Luzerne Register, 103. 4. A sheriff's sale of real estate cannot be set aside either on account of inadequacy of price, lack of notice of mortgages on the property, or because the owner had kept away bidders. *Erb's Estate*, 2 Pearson, 160. 5. After a sheriff's sale has been confirmed, the purchase money paid, the deed acknowledged, recorded and delivered to the purchaser, and possession of the premises taken by him, the court has no power, upon a rule to show cause, to set aside the sale and compel the purchaser to deliver up the deed to be cancelled. It is a good title until, it is proved that he procured it by fraud upon the defendant in the execution. This must be done either in an action of ejectment or by a bill in equity. *Evans vs. Maury*, 112 Pa., 300. *Keating vs. Keating*, 6 Kulp, 178. 6. After a sheriffs' deed has been acknowledged and delivered, and purchase money paid, it is too late for a judgment creditor to ask to have the sale set aside. *Fahinger vs.*

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Fahinger, 8 Luzerne Register, 29. 7. A sheriff's sale will not be set aside after the acknowledgment and delivery of the sheriff's deed, even though there were some irregularities. *Garman vs. Garman*, 4 Lancaster Review, 305. 8. The court should incline to support sheriff's sales when it can be done consistently with justice. Mere inadequacy of price, in the absence of fraud or collusion, is not sufficient to set aside the sale. Whatever constitutes a valuable feature of the property should be specified in the advertisement. It is not the duty of the sheriff to state whether the property is clear of encumbrances. *Herr vs. Draucher*, 7 Lancaster Review, 383. 9. After acknowledgment of a sheriff's sale in open court, the title of the sheriff's vendee cannot be affected by mere irregularities, however gross. *McAfee vs. Harris*, 25 Pa., 102. *Levan vs. Millholland*, 114 Pa., 57. 10. Where an application to set aside a sheriff's sale is made immediately after the sale and before the acknowledgment of the deed, and the price is grossly inadequate, the court is at liberty to seize upon any other circumstance in order to give relief. *Ritter vs. Gets*, 161 Pa., 64. 11. Good faith requires that the application to set aside a sheriff's sale should be made at the earliest possible period, with notice to all parties interested. It is true, it may be entertained at any time before the acknowledgment of the sheriff's deed; but it is not right that a party should sleep on his rights, while the purchaser is thereby incurring expense. *Young vs. Wall*, 1 Phila., 69. *Ingersoll vs. Sherry*, *Idem*, 68.

LVI. NEGLECT TO SHOW AUTHORITY TO SELL. A sheriff's deed conveys no title, unless the sheriff was authorized to sell, and his authority can be proved in no other manner than by showing a judgment, followed by an execution and writ of *venditioni exponas*. *Hampton vs. Speckenage*, 9 S. & R., 221.

LVII. NEGLECT TO TAKE POSSESSION OF GOODS SOLD. 1. Where the plaintiff in an execution in good faith sells and also purchases the property of the defendant in order to protect himself and acquire a good title, he may leave the goods in the possession of the defendant without thereby making them sub-

Sheriff's Sale—Continued.

ject to the latter's debts. A change of possession is not necessary to give validity to a judicial sale. *Bisbing vs. Bank*, 93 Pa., 79. 2. One who buys personal property at private sale, should take and retain possession, or the contract may be presumed fraudulent against creditors of the vendor. But one who buys at sheriff's sale, may safely leave the property with the defendant in the execution, under a contract of bailment. *Dick vs. Cooper*, 24 Pa., 217. 3. Where one buys property at a public judicial sale, he may leave it with the defendant in the execution, without making it liable under another execution. *Dick vs. Lindsay*, 2 Grant, 431. 4. The purchaser at sheriff's or constable's sale may leave the goods in the possession of the defendant, as whose property it was sold, under any lawful contract of bailment. *Smith vs. Crisman*, 91 Pa., 428. 5. Retention of possession by the former owner of a chattel sold at sheriff's sale, is not an index of fraud, because the sale was not the act of the person retaining, but of the law, and, because a judicial sale by the sworn officer of the court, shall be deemed fair, until proved otherwise. A chattel, thus purchased, may safely be left in the possession of former owner on any contract of bailment. *Myers vs. Harvey*, 2 P. & W., 481. *Streeper vs. Eckert*, 2 Wh., 307.

LVIII. NEGLECT TO TENDER DEED. It is not necessary in a suit against a purchaser of land at sheriff's sale, brought to recover the purchase-money, to aver a tender of a deed acknowledged. It is usually a cash sale, and the delivery of the deed is an act subsequent to the payment of money. *Negley vs. Stewart*, 10 S. & R., 207.

Ships. See "BOATS."

I. NEGLECT BY RESHIPMENT. Where the defendants had not reserved the right of reshipping goods entrusted to them as carriers, and nevertheless placed the goods *in transitu* on another vessel, whereby they were lost, the insurer of the goods may sue in the name of the shipper for reimbursement, where he has paid the entire loss. *Gales vs. Hailman*, 11 Pa., 521.

Ships—Continued.

II. NEGLIGENCE IN CARRYING FREIGHT. An unnecessary deviation, and injury resulting to the cargo, is no defence to an action for freight, except so far as the loss resulted from the deviation. So, also, where the master has contracted to carry no other cargo, an injury resulting is no defence, except so far as the damage resulted from the breach of his contract. *Souter vs. Baymore*, 7 Pa., 415.

III. NEGLIGENCE IN CONSTRUCTION. An opinion expressed by the crew of a lake vessel as to the soundness of a chain cable, is admissible in proof of its adequacy to the ordinary exigencies of navigation. *Reed vs. Dick*, 8 W., 479.

IV. NEGLIGENCE OF CAPTAIN AND CREW. It is no defence to an action on a marine policy of insurance, that a loss directly caused by a peril of the sea happened through the negligence of the captain and crew. *Ins. Co. vs. Insley*, 7 Pa., 223.

V. NEGLIGENCE OF CARGO. A master of a vessel in a port of refuge is not justified in selling the cargo, as damaged, if it be shown that no necessity existed for a sale. *Myers vs. Baymore*, 10 Pa., 114.

VI. NEGLIGENCE OF OWNER. Where a cargo becomes wet with sea water by the agency of causes with which the winds and waves have no connection, the insurer of the goods is not liable. Thus, contact may be produced by bad storage, defective calking, imperfect closing of the hatches or want of pumping, in which events, the owner of the vessel becomes liable. *Myers vs. Ins. Co.*, 26 Pa., 194. *Fleming vs. Ins. Co.*, 3 W. & S., 153.

VII. NEGLIGENCE, RESULTING IN COLLISION. 1. The question, whether the injury was the result of gross negligence or of mere accident, falls within the province of the jury. The fact that the ship is in charge of a licensed pilot does not relieve her owners from liability for a collision, occasioned by negligence. The pilot of the vessel is in the actual service of the owner of the ship, though placed there by the provident act of the legislature. *Bussy vs. Donaldson*, 4 D., 206. 2. An action cannot be maintained by the owner of goods on board

Ships—Continued.

a vessel, against the owners of another vessel for damages for an injury done the goods by collision of the two vessels, if there have been mutual negligence in the captains of the vessels. *Simpson vs. Hand*, 6 Wh., 311.

VIII. NEGLIGENCE TO DELIVER GOODS. 1. By the general custom, the liability of shipowners is at an end, when the goods are landed in the daytime at the usual wharf. Notice should be given to the consignee of the unloading. A manifest or report of the cargo is made by the master, and deposited at the custom house. *Cope vs. Cordova*, 1 R., 209. 2. The responsibility of a carrier does not end by delivery of goods on the wharf, and notice given to the consignee; but it is the master's duty to attend to the actual delivery. *Hemphill vs. Chenie*, 6 W. & S., 62.

IX. NEGLIGENCE TO EMPLOY PILOT. A policy of insurance is not avoided by the neglect to employ a pilot in the bay, although the omission to do so was a breach of a municipal regulation. *Flanigen vs. Ins. Co.*, 7 Pa., 306.

X. NEGLIGENCE TO LAND PASSENGERS. A passenger has a right of action against a shipping company, for neglecting to land him at the port of destination for which he had purchased a ticket. In this case, the ship was struck by lightning and sunk, and the passengers were removed to a vessel bound for a different port. *Cope vs. Dodd*, 13 Pa., 33.

XI. NEGLIGENCE TO REPAIR. 1. There is an implied warranty, that a ship in carrying merchandise of shippers should be seaworthy. If it is lacking in this respect, and the goods consigned be injured or lost as a result, a marine insurance company, in which the goods are insured is not liable, but the loss falls on the owners of the vessel. *Flemming vs. Marine Ins. Co.*, 4 Wh., 64. 12 Pa., 391. 2. No insurance is valid on a vessel, if she is put to sea in an unseaworthy condition. The interests embarked in common, and a regard for human life require that the law in this respect should not be relaxed. The owner must perform his duty, and not throw on the insurer perils not within the contract. *Prescott vs. Union Ins. Co.*, 1 Wh., 407.

Sidewalks. See "PAVEMENTS."

I. NEGLECT BY ENCROACHMENTS. The obstruction of a sidewalk not being more injurious to the relators in a mandamus, whereby it is sought to abate, than to the inhabitants at large, the remedy is exclusively by indictment. Where the nuisance is a public one, without special injury to any individual, a civil remedy to remove it does not exist. *Reading vs. Comm.*, 11 Pa., 196.

II. NEGLECT OF TENANT OF PREMISES. The tenant in possession is liable for an injury resulting from the grate over a vault under the highway in front of his premises being out of repair, if the grate was in good order when they were leased to the tenant. *Bears vs. Ambler*, 9 Pa., 193.

III. NEGLECT TO ENCLOSE HATCHWAY. Where the owner of a property erects on his sidewalk a hatchway leading into his cellar, and neglects to enclose it, or to keep a light burning near it after night, he is liable to any one who may fall into it, and who has not been lacking in ordinary care. *Bush vs. Johnston*, 23 Pa., 213.

IV. NEGLECT TO PROTECT AREAWAY. In an action on the case to recover damages by the plaintiff in falling into an areaway on the sidewalk, leading into the defendant's cellar on a public street in a city, and left open through culpable neglect of the defendant, held, that if by ordinary and reasonable care the plaintiff might have avoided the injury, he was not entitled to recover. Ordinary care must depend on the circumstances of each case, of which the jury is to judge. *Beatty vs. Gilmore*, 16 Pa., 463.

V. NEGLECT TO PROTECT OPENINGS. For an injury resulting from neglect to cover a coal hole in the sidewalk, the tenant of the premises is primarily responsible. If no one is in possession, or if the landlord is bound for repairs, then the owner of the premises is responsible. *Grier vs. Sampson*, 27 Pa., 184.

Signs.

NEGLECT IN ERECTING. When a tenant rents a floor he rents the inside and not the outside, and he has no right to

Signs—Continued.

put out a sign in front, unless with the consent of the landlord. *Hele vs. Stewart*, 19 W. N., 129.

Slander.

I. NEGLECT OF ACTIONABLE WORDS. Words spoken of a private person are not actionable, unless they impute an indictable offence of an infamous character, or subject to an infamous or disgraceful punishment. It is not slander, to assert that a party has stolen standing corn or any other thing adhering to the freehold. The unlawful taking of a thing attached to the freehold is trespass, and not larceny. *Stitzell vs. Reynolds*, 67 Pa., 54.

II. NEGLECT IN IMPOSING COSTS. In slander, where the damages recovered are less than forty shillings, no more costs can be recovered than damages. *McCarrigher vs. Wilcox*, 2 Luzerne Register, 208.

III. NEGLECT IN PLEADING. In an action of slander, the defendant may plead both "not guilty" and "justification," though apparently inconsistent pleas. *Peters vs. Ulmer*, 74 Pa., 402.

IV. NEGLECT IN REPEATING. One who maliciously repeats a slander is guilty and answerable in damages. *Wallace vs. Rodgers*, 156 Pa., 395.

V. NEGLECT IN THE COUNTS IN A DECLARATION. Words laid in a count for slander, which are not actionable of themselves and have no *colloquium* to connect them with intrinsic circumstances, are not helped by an innuendo. Words are actionable in themselves, only where they impute an offence indictable and punishable at common law or by statute. It suffices to state the substance of the words spoken. *Lukehart vs. Byerly*, 53 Pa., 418.

VI. NEGLECT TO ALLEGE ACTIONABLE WORDS. In slander, it is not necessary that all the words laid in the declaration should be actionable; it is sufficient if some are. All words spoken at the time may be laid and given in evidence as showing the *animus*. To render words actionable *per se*, they must

Slander—Continued.

impute an offence of moral turpitude punishable criminally. *Klumph vs. Dunn*, 66 Pa., 141.

VII. NEGLIGENCE TO GIVE THE EXACT WORDS. Slanderous words must be set out in the language in which they were spoken. *E. vs. R.*, 12 Pa. County, 274.

VIII. NEGLIGENCE TO PROVE SPECIAL DAMAGE. Words, whether written or spoken, which are not actionable in themselves, cannot be made the subject of action without proof of special damage resulting from them. *Allison vs. Bradstreet Co.*, 17 Phila., 348.

Snow.

NEGLECT TO REMOVE. 1. Where the town authorities allowed banks of snow and ice to remain on the sides of a street, where they had been removed from pavements and railway tracks, resulting in the overthrow of a sleigh and the injury of its occupants, the town may be held liable in damages. *Carr vs. Easton City*, 142 Pa., 139. 2. In sparsely-settled townships, after a fall of snow by which the roads are blocked, it is not necessary that the supervisors should open the roads through their entire distance of the width of two tracks. One track is enough, if a sufficient number of turnouts are provided. *Comm. vs. Billheimer*, 1 Northampton Co., 145. 3. A municipal corporation is not liable to a pedestrian for injuries caused by a fall on snow and ice which had not been removed from a pavement, the slippery condition of which could have been seen and readily avoided by the person injured. *Dehnhardt vs. Philadelphia*, 15 W. N., 214. 4. Where a municipality negligently suffers ice and snow to accumulate in ridges on pavements, it is liable for personal injuries suffered thereby. It is not liable, however, for the ordinary frozen and slippery pavements of the winter season, nor for the non-removal of ice and snow, unless it accumulates as aforesaid. *Dehnhardt vs. Philadelphia*, 16 Phila., 47. 5. A foot passenger on the sidewalk of a city street, who, with full knowledge of a dangerous ridge of ice on a pavement, deliberately attempts to walk over it

Snow—Continued.

instead of around it, and who falls and is injured, is guilty of contributory negligence *per se*. He has no claim against the city authorities in such case for not removing such obstruction. *Erie vs. Magill*, 101 Pa., 616. 6. It is not negligence on the part of a ferry-boat company to remove the snow from its deck during the progress of a snow-storm, even if the snow renders the deck slippery and difficult to walk upon. In the present case there was no accumulation of ice or snow on the deck from a previous fall of snow, but merely a slippery condition caused by a snow-storm in progress at the time of an injury to a passenger by falling upon the deck. *Fearn vs. Ferry Co.*, 143 Pa., 122. 7. There is no liability on the part of a borough for personal injuries inflicted upon a person, who, while walking in broad daylight, slips and falls on a small ridge of ice on a sidewalk, formed by water dripping from an awning. If the ridge of ice was dangerous, the action should have been against the owner of the awning. *Hanlon vs. Warren*, 2 Monaghan, 595. 8. A municipality is not liable for an injury caused to a foot passenger by reason of the slippery condition of its streets alone. It is liable, however, where such injury is occasioned by the accumulations of ice or snow into dangerous ridges. *Mauch Chunk vs. Kline*, 100 Pa., 119. 14 Lancaster Bar, 55. 9. In an action against a municipality to recover damages for a fall upon a sloping sidewalk, covered with hard-packed snow, rendered slippery by falling rain, a nonsuit was awarded, as no obvious obstruction was proved, nor evidence of how long the sidewalk had remained in an icy condition, or of notice to the authorities, either actual or constructive. *Springer vs. Philadelphia*, 22 W. N., 132. 10. The insured cannot recover on a policy against storm, where he allowed a heavy body of snow to remain several days upon the roof of the building insured, resulting in the destruction of the roof by a subsequent wind and rain. The injury was not in such case wholly caused by the storm, but mainly by the contributory negligence of the owner of the structure, in not removing the snow when he had the opportunity. *Tyson vs. Ins. Co.*, 2 Montgomery Co., 18.

Special Matter.

NEGLECT OF NOTICE. 1. A formal notice in the prothonotary's office of special matter is not a compliance with the rule requiring it to be given to the party. *Erwin vs. Seibert*, 5 W. & S., 104. 2. Where evidence is offered to prove matters growing out of the dealings of the parties, and which was part of the *res gestæ*, it is not admissible under the plea of *non assumpsit* without notice of special matter. *Fisher vs. Ball*, 93 Pa., 390. 3. The only effect of omitting notice of special matter is to confine the defence to the general matters admissible under the pleas on the record. *Moyer vs. Fisher*, 24 Pa., 513. 4. Where notice of special matter is required to be given, and evidence of such matter is objected to on the trial because notice had not been given, the objection should be noted in the court below, or it will not be sustained on error. *Rearick vs. Swinehart*, 11 Pa., 233. *Miller vs. Stern*, 12 Pa., 383.

Specific Performance.

I. NEGLECT IN THE PRAYER. A bill for specific performance is inadequate, which does not contain a tender of the balance of the purchase money, or a statement of an adequate reason for a failure to make such tender. *Wilson vs. Buchanan*, 170 Pa., 14.

II. NEGLECT OF PURCHASER. 1. Specific performance will not be decreed to a purchaser, after he has permitted a long time to elapse without evincing a fixed intention to carry his contract into execution, especially if the circumstances have altered. *Miller vs. Henlan*, 51 Pa., 265. 2. A man in possession of land under a parol contract, obliged to seek the aid of a court of equity to perfect his right, is bound to be prompt and vigilant. The active duties are all on him. Not only must he maintain his possession, but he must show himself ready, willing and eager to perform the contract on his part. *Zimmerman vs. Wagner*, 31 Pa., 405.

III. NEGLECT TO DECREE. 1. Equity will not decree specific performance of a contract for the exchange of lands,

Specific Performance—Continued.

against a party who at the time appointed for performance was ready and willing, and in favor of the other party who was not only in default, but who never offered to perform according to the terms of the contract, and whose laches rendered performance on his part impossible. *Alexander vs. Wunderlich*, 118 Pa., 610. 2. When building restrictions exist, which are unreasonable or affect the enjoyment and value of the property, specific performance will not be decreed against the vendee. *Anders' Estate*, 5 W. N., 78. 3. Specific performance is of grace; if a chancellor find reasons to withhold his aid, he will leave the party to his remedy at law. *Brady's Appeal*, 66 Pa., 277. 4. Specific performance is of grace, and not of right. A much less degree of proof is required to induce a chancellor to refuse specific performance of a contract for the sale of land, than is required to induce him to reform or set it aside. *Brown vs. Pitcairn*, 148 Pa., 387. 5. Specific performance will not be decreed of a contract for the sale of land, where the description of the land is vague. *Cortelyou vs. Ott*, 1 Northampton Co., 170. 6. Specific performance of a contract to convey land will not be decreed; where the terms of the contract are not shown, delay in instituting proceedings unexplained, and the whole matter rests upon inference. *Daisz Appeal*, 128 Pa., 572. 7. The specific execution of a real contract in equity is not of absolute right in the party asking it, but of sound discretion in the court. Courts of equity will not refuse their aid to a vendor who asks a specific execution of a contract for the sale of land, on the ground of doubts in relation to the title, except where these doubts are considerable and rational; and the opinion of conveyancers and counsel against a title will not justify a party in refusing to comply with his contract. A court of equity will not compel the specific performance of a contract made by an agent not authorized by writing to make it. *Dalzell vs. Crawford*, 1 Parsons, 37. *Parrish vs. Koons*, *Idem*, 78. 8. One must do equity before he asks equity. Specific execution of a contract is not of right, but of grace; and he who seeks relief

Specific Performance—Continued.

at the hands of a chancellor must show himself ready and willing to do all that he ought in good conscience to do, and if he do not, his bill will be dismissed. *Datz vs. Phillips*, 137 Pa., 203. 9. Specific performance is within the sound discretion of the chancellor. There must be no default in the plaintiff, which would render it inequitable to grant him the relief. *Dohnert's Appeal*, 64 Pa., 311. 10. The general rule in equity is that specific performance of a contract relating to personal property will not be enforced. *Engelhardt vs. Oil Co.*, 36 Pittsburgh Journal, 204. 11. Specific performance will not be enforced, unless there is no doubt as to the merits, nor where the decree will be more injurious to one party than beneficial to the other. *Ewing vs. Sewing Machine Co.*, 2 Lancaster Review, 218. 12. Upon an application for specific performance of a parol contract for the sale of land, in the orphans' court, proof of the contract, of its terms and of payment is indispensable, in order to warrant a decree. *Fetterling's Estate*, 1 Woodward's Decisions, 169. 13. A party cannot call upon an equity court, unless he has shown himself ready, desirous, prompt and eager. If specific performance is sought by a purchaser, after he has permitted a long time to elapse without evincing a fixed intention to carry his contract into execution, especially if circumstances are altered, a court of equity will not decree it. *Foster's Estate*, 23 W. N., 271. 14. Specific performance is not of right, but of grace, and will be awarded only to a purchaser who is eager, ready and prompt to perform. As a rule, equity will not apply it to chattels. *Washabaugh vs. Stauffer*, 81 Pa., 497. *Foll's Appeal*, 11 Lancaster Bar, 129. 15. A decree for specific performance is not a matter of course, but rests in the sound discretion of the chancellor. Even when the agreement is good, the price adequate and no blame attaches to the purchase, if the transaction be unjust and inequitable, special performance may be denied, and the parties turned over to their remedy in damages. *Friend vs. Lamb*, 152 Pa., 529. 16. Where it appears that there has

Specific Performance — Continued.

been an honest and material mistake, although by only one of the parties, equity will not decree specific performance of an agreement for the sale of real estate, but will leave the parties to their remedy at law. *Galloway vs. Horne*, 2 Delaware Co., 515. 17. A court of equity will not decree the rescission of an executed contract, except on proof of fraud or mistake. Inadequacy, improvidence, surprise and hardship are not sufficient; although they will induce a chancellor to refuse a specific performance. Misrepresentation as to value is not ground for rescission, and is never relieved against when there is no fiduciary relation between the parties. *Graham vs. Pancoast*, 30 Pa., 89. 18. There is error in holding that a parol contract of sale cannot be specifically enforced, unless the vendee can show that he has made improvements for which he cannot be compensated in damages. Cases exist in which the equities of the vendee rest upon other available grounds. *Jamison vs. Dimock*, 95 Pa., 52. 19. A decree for the specific performance of a contract will not be made where the contract is uncertain. *Kraber vs. Nes*, 3 York Record, 123. 20. A court of equity will not decree a specific performance of the sale of land where the land is wholly uncertain in location and description. *Lee's Appeal*, 12 W. N., 183. 21. Specific performance of an agreement to convey land will not be decreed, when the pleadings show that parol evidence is necessary to rectify the description, so as to make it conform to the intention of the parties. Specific performance is of grace, not of right, and should not be enforced unless there is no doubt as to the merits, nor where the decree will be more injurious to one party than beneficial to the other. *McCann vs. Pickup*, 17 Phila., 57. *Ewing vs. Machine Co.*, *Idem*, 149. *Reno vs. Moss*, 120 Pa., 61. *Hess vs. Callender*, *Idem*, 151. *Ballon vs. March*, 133 Pa., 64. 22. Specific performance will not be granted of an agreement for the sale of real estate so ambiguous and contradictory in its terms, as to make its meaning uncertain. *Merrill's Appeal*, 16 W. N., 346. 23. A decree for specific performance will

Specific Performance—Continued.

never be made by a court of equity in favor of a vendor, unless he is able to offer a title marketable beyond a reasonable doubt, nor against a vendee, where he is able to show any circumstances which would make it unconscionable to enforce the contract. *Mitchell vs. Steinmetz*, 98 Pa., 251. 10 W. N., 43.

24. A bill for special enforcement of a contract is an appeal to the chancellor's conscience, on which he exercises a sound discretion. He will not interfere, if the bargain is hard or unconscionable, or the terms unequal, or the complainant is seeking an undue advantage. *Oil Creek R. R. vs. Atlantic R. R.*, 57 Pa., 65. *Wistar's Appeal*, 80 Pa., 484. 25. Lapse of time, change of circumstances, and indifference on the part of a vendee of land, are circumstances to induce a chancellor to refuse a decree of specific performance. *Patterson vs. Martz*, 8 W., 374. *McGrew, vs. Foster*, 113 Pa., 649.

26. Specific performance of an agreement to sell real estate will not be decreed against a vendor, a married man, whose wife refuses to join in the conveyance, unless the vendee is willing to pay the full purchase money and accept the deed without the wife; if not, he must resort to his action at law for damages. *Rieoz' Appeal*, 73 Pa., 485. *Burk's Appeal*, 75 Pa., 141. *Saller vs. Rieoz*, 1 Foster, 150.

27. Specific performance of a contract to sell real estate will not be decreed on petition of a purchaser against a decedent's estate, unless the heirs or devisees have been made parties to the proceedings. *Rohrbacker's Estate*, 2 Pa. Dist., 106. 28. Where a party seeks to enforce specific performance of a contract, he must show that he himself has been ready, prompt and desirous of performance. If he has been guilty of gross laches with regard to his rights, and by conduct, long persisted in, conveyed the idea he has abandoned them, he cannot, after there has been a material change of circumstances, move a court of equity to decree specific performance. *Russell vs. Baughman*, 94 Pa., 400. *Rennyson vs. Rozell*, 106 Pa., 407.

29. It is a rule in equity not to enforce performance of a contract in favor of a vendor of real estate, if he cannot offer

Specific Performance—Continued.

a marketable title beyond reasonable doubt. *Swain vs. Fidelity Co.*, 54 Pa., 455. 30. Specific performance of an oral contract to convey land will not be decreed without clear proof of the contract. *Shafer's Appeal*, 110 Pa., 382. 51. To entitle a party to a decree for specific performance, the contract must be mutual; both parties must have a right to compel specific performance. Hence a *feme covert* cannot maintain a bill for specific performance. *Tarr vs. Scott*, 4 Brewster, 49. 32. If the party seeking specific performance has been guilty of gross laches, or inexcusably negligent in performing the contract on his part, or if meanwhile there has been a material change affecting the rights, interests or obligations of the parties, courts of equity will not grant relief. *Temple vs. McConkey*, 1 Pittsburg, 367. 33. The proof required in an action brought upon a lost writing, the terms of which are to be supplied by oral testimony, must stand upon the same basis as an action upon a parol contract. For specific performance in such cases, it is indispensable to prove, by indubitable evidence, the precise terms of the whole agreement. *Van Horn vs. Munnell*, 145 Pa., 502. 34. Decrees in equity for specific execution are not like judgments at law, a matter of right; they are within the discretion of the chancellor and of grace. When the equity of the party under his contract is not clear, or his case is inequitable, courts of equity refuse specific execution, and leave the party to his action at law to recover damages for a breach of the contract. *Weise's Appeal*, 72 Pa., 354.

IV. NEGLECT TO FULFIL CONTRACT. A contract for the purchase of land, not put in writing, passes no interest to the purchaser, and furnishes no right, in law or equity, to demand a specific performance; but damages may be recovered to compensate the purchaser for what he may have done, relying on the contract, and for permanent improvements made with the knowledge of the seller, and of which he gets the benefit by taking back the land, deducting the value of the rents and profits during the purchaser's occupancy. *Bender vs. Bender*, 37 Pa., 419.

Specific Performance—Continued.

V. NEGLECT TO GIVE NOTICE OF PROCEEDINGS. Where both the vendor and vendee of real estate are deceased, intestate, upon a proceeding in the orphans' court, by the administrator of the vendor, to enforce the specific execution of the contract, the administrator and heirs of the vendee, and all persons deriving title under them, or interested in the contract, must be made parties ; and notice should also be given to the heirs of the deceased vendor. *Anshutz's Appeal*, 34 Pa., 375.

VI. NEGLECT TO MAKE TITLE. A court of equity will not compel specific performance of a contract for the sale of land, unless the vendor can make a marketable title. If the vendor cannot make such title as the vendee is bound to accept, he must refund what has been paid, and bring ejectment, when the vendee must pay the balance of the purchase money, or surrender possession. *Nicol vs. Carr*, 35 Pa., 381.

Stage-coaches.

I. NEGLECT IN DRIVING. For an injury to a passenger by the upsetting of a stage-coach, the remedy may be either *assumpsit* or case; if the former be adopted, the plaintiff must prove the liability of all the parties sued ; but if the latter, he may recover against those of the defendants who are liable. *McCall vs. Forsyth*, 4 W. & S., 179.

II. NEGLECT OF BAGGAGE. 1. Stage-coaches are liable as common carriers. They have endeavored to escape liability, by notices that they would not be responsible for baggage, inserting in their receipts, "all baggage at the risk of the owner." In some cases, a distinction has been made as to articles of small bulk and weight, but of great value, which was not made known to the stage owner. Money is not generally placed in a trunk, and the owner and plaintiff while testifying to the contents of the trunk, *ex necessitate rei*, is however, precluded from testifying to money placed there. *David vs. Moore*, 2 W. & S., 230. *Whitesell vs. Crane*, 8 W. & S., 369. 2. The principle of necessity, which enables a party to prove the contents of a lost trunk, applies with as much force to the

Stage-coaches—Continued.

wife as to her husband. Either husband or wife may prove the quantity of wearing apparel belonging to each, including the wife's jewelry, and every other article pertaining to her wardrobe necessary in travel. Payment of the stage fare need not be proved, as it is seldom neglected. *McGill vs. Rowand*, 3 Pa., 451. 3. In a suit to recover the value of a trunk lost from a stage coach, the plaintiff is authorized, *ex necessitate rei*, to prove the contents of his trunk, and the value of the articles composing them. *David vs. Moore*, 2 W. & S., 230. *Whitesell vs. Crane*, 8 W. & S., 369.

III. NEGLIGENCE OF DRIVER. 1. Through the carelessness of a driver, a stage was overturned, and passengers injured. Suits were instituted against the five proprietors of the stage line, two only of whom were served with process. One of these parties paid the amount of the execution on the judgment obtained. Held, that he was entitled to recover from the other parties, defendants, the respective contributive amounts due by them. *Horbach vs. Elder*, 18 Pa., 33. 2. A carrier of passengers, who provides himself with a sufficient vehicle in all respects, and a safe and skillful driver, who discharges his duty faithfully, is never responsible for injury. *Penna. R. R. vs. Zebe*, 37 Pa., 424. 3. A passenger, observing the horses of a coach mismanaged by a drunken driver, and the coach itself about to upset, leaped from the vehicle, and was badly injured. The court held the proprietors of the stage liable, because the misconduct of their servant had caused the alternative of a dangerous leap or remaining at great peril. *R. R. vs. Aspell*, 23 Pa., 150. 4. An agent of a stage company, authorized to obtain surgical aid for a passenger, injured by the upsetting of a coach, is not thereby authorized to employ a physician for one who had acted as coachman without the consent or knowledge of the company. *Shriver vs. Stevens*, 12 Pa., 258.

IV. NEGLIGENCE OF GOODS CARRIED. The proprietors of a stage-coach, used for the conveyance of passengers, are not liable as common carriers for goods sent by such coach. But if they have been in the practice of receiving and carrying for

Stage-coaches—Continued.

hire, in such coach, parcels of merchandise for persons not passengers therein, they are responsible as carriers in relation to such goods. *Beckman vs. Shouse*, 5 Rawle, 179. *Leonard vs. Hendrickson*, 18 Pa., 43.

V. NEGLECT TO DELIVER BAGGAGE. Baggage is not strictly confined to wearing apparel. A carpenter's tools, contained in his trunk, may in such case be classed as baggage, and a stage-coach company held liable for its non-delivery. *Porter vs. Hildebrand*, 14 Pa., 124.

Stamps.

I. NEGLECT IN CANCELLATION. In cancelling a stamp, the maker's initials and date are necessary by act of congress. The omission to do this, is remedied by an application to the collector to stamp. *Andress vs. Thomas*, 6 W. N., 414.

II. NEGLECT TO AFFIX. 1. A paper required to be stamped under the act of congress of July 13, 1866, cannot be given in evidence if unstamped. *Chartiers vs. McNamara*, 72 Pa., 278. 2. The acts of congress do not declare an unstamped instrument void, but that it shall not be admitted to record or received in evidence. *Jones' Appeal*, 62 Pa., 324. 3. When it appears that parties through whose mistake or omission an instrument has not been properly stamped, have paid the full price of the stamp, together with the penalty, and have produced the collector's receipt therefor, the instrument will be received in evidence, though the collector has omitted to affix and cancel the stamp. *Lerch vs. Snyder*, 112 Pa., 161. 4. The absence of a revenue stamp on a promissory note at the time of negotiation, does not prove want of consideration. *Long vs. Spencer*, 23 Pittsburg Journal, 3. 5. The internal revenue act merely made the want of a stamp a disqualification of the instrument as evidence. If omitted to be affixed at the execution of a document, it may be placed thereon by the collector at any subsequent time, and will be treated *nunc pro tunc*. *Long vs. Spencer*, 78 Pa., 303. 6. Where, by act of congress, stamps should be affixed to

Stamps—Continued.

bonds or other documents, the omission to do so will not render the obligations void, unless it was omitted with intent to evade the act. It is the duty of the obligor in a voluntary bond to add the stamp, and neither he nor his sureties can allege his own neglect in avoidance of the bond. *McGovern vs. Hoesbach*, 53 Pa., 176. *Curry Bank vs. Rouse*, 3 Pittsburgh, 18. 7. A judgment entered upon a bond not stamped, is not void, and if erroneous, can be reached only by the defendant not a creditor. *Ritter vs. Brendlinger*, 58 Pa., 68. 8. If, by direction of the maker, a stamp is placed on a note within a reasonable time after it is made, it may be given in evidence. *Walsh vs. Carroll*, 6 Phila., 590. *Bergner vs. Palethorp*, 2 W. N., 297. *Gay vs. Comstock, Idem*, 532.

III. NEGLECT TO CANCEL. Either party to an unstamped instrument may affix and cancel a stamp when a stamp duty is imposed by federal laws, but the stamp must be affixed at the time the instrument is issued, or the same will be deemed invalid. *Voight vs. McKain*, 2 Pittsburgh, 522.

Statement.

I. NEGLECT IN AFFIDAVIT. In an action of trespass, plaintiff's attorney swore that the statement was true, to the best of his knowledge and belief. Held, that, under the rule of court, the affidavit of the attorney was not sufficient. *Warner vs. R. R.*, 1 Pa. Dist., 247.

II. NEGLECT IN AMENDING. Where the plaintiff makes an amended statement after a sufficient affidavit of defence filed by defendant to the original statement, the court will not give judgment. *Fahlnecker vs. Harrington*, 21 W. N., 54.

III. NEGLECT IN AVERMENTS. 1. A statement is sufficient, which sets forth the circumstances under which the claim arises, and states explicitly the amount demanded. *Blanchard vs. Hunter*, 7 Pa. County, 552. 2. The statement of the plaintiff's demand, under the act of May 25, 1887, must set forth in clear and concise terms such averments of fact as, if not controverted, would entitle him to a verdict for

Statement—Continued.

the amount of his claim. *Chestnut St. Bank vs. Ellis*, 161 Pa., 241. 3. Under the procedure act of 1887, the plaintiff's statement of demand must contain all the essential qualities of a declaration at common law. *Emmens vs. Gebhart*, 2 Northampton Co., 137. 4. Where a plaintiff's statement, under the act of May 23, 1887, is believed to be insufficient, the proper practice is to demur thereto, specifying the grounds of demurrer. Where such statement alleges contracts or notices in writing, copies of the same should be set out and served upon the defendant. *Fox vs. Brinton*, 1 Pa. Dist., 608. 5. The statement filed must aver facts, not mere conclusions of law, and with particularity enough to notify defendant of the character and foundation of the claim he is to meet. While a stranger may, in some cases, make affidavit to the statement; by the act of May 25, 1887, a sufficient reason therefor should appear. *Goldbeck vs. Brady*, 5 Lancaster Review, 17. *Doriot vs. Hageman, Idem*, 264. 6. The law does not oblige the plaintiff to disclose his case in a statement with the same nicety and precision of averment, as was required in a declaration; the object being merely to inform the defendant with reasonable accuracy of the nature and extent of the plaintiff's claim. *Murdock vs. Martin*, 25 W. N., 288. 132 Pa., 93. *McGary vs. Barr, Idem*, 310. 7. It is sufficient, if the explicit averment of the amount claimed to be due, required by the rule, be made in the body of the statement; it need not be set out again in the affidavit supporting the statement. *Prince Co. vs. Linderman*, 2 Pa. Dist., 4.

IV. NEGLECT IN CLEARNESS. When a statement of claim, open to objection for want of perspicuity, has not been demurred to, no defect therein will be fatal, after trial on the merits, verdict and judgment for the plaintiff, unless it is shown to have injuriously affected the trial. In such case, the proper amendment will be considered as having been made. *Chapin vs. Iron Co.*, 145 Pa., 478.

V. NEGLECT IN COPY FILED. If no affidavit of defence has been filed, a judgment will not be reversed, because the

Statement—Continued.

instrument, a copy of which was filed, was not such as entitled the party to judgment. *Smith vs. Savings*, 10 Pa., 13.

VI. NEGLECT IN FILING. The procedure act of May 25, 1887, authorizes the filing and service of plaintiff's statement with the writ, or at any time thereafter; and the entry of judgment for want of an affidavit of defence at any time on or after the return day, and after filing and fifteen days' service of the statement of claim and of the writ. *Weigley vs. Teal*, 23 W. N., 521.

VII. NEGLECT IN FORM. 1. A statement of claim is not in violation of the act of May 25, 1887, which uses the form of a declaration, customary under the old practice, if the statement sets out a cause of action with the exact dates, amounts and particulars of contract sued upon, with no irrelevant matter. *Smith vs. Smith*, 166 Pa., 563. 2. A defect in a statement, such as is amendable by leave of court, is cured by the verdict of the jury. *Allen vs. Coal Co.*, 5 Kulp, 404.

VIII. NEGLECT IN SERVING. The act of May 25, 1887, does not require service of the plaintiff's statement within the county or state. *Cochran vs. Pyle*, 10 Pa. County, 198.

IX. NEGLECT IN SIGNING. 1. A statement in an action of *assumpsit*, under the act of May 25, 1887, where the plaintiff is a corporation, must be signed by an officer of the corporation and show his title. *Merchants' Bank vs. Brooks*, 6 Pa. County, 314. 2. The act of 1887 says: "The statement shall be signed by the plaintiff or his attorney." *Medler vs. Madlinger*, 12 Pa. County, 474.

X. NEGLECT OF DATE. A statement in an action of *assumpsit*, which is defective for the want of date, is cured by a verdict, so also where the consideration for the assumption is not stated. Lawyers file statements, which are often so badly drawn, that their clients could have drawn them as well. The same nicety and precision in averments, requisite in a declaration, are not requisite in a statement. *Graff vs. Graybill*, 1 W., 428.

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XI. NEGLECT OF JURAT. An amended statement must be sworn to. *Penna. R. R. Co. vs. Walsh*, 29 W. N., 410.

XII. NEGLECT TO ABRIDGE. Under the procedure act of May 25, 1887, different counts or modes of stating the same claim are not permitted. It is not invalid, however, because it is divided into various paragraphs separately numbered. The length of a statement is no legal objection to it, for although the statute provides that it shall be concise, it makes no provision for enforcing this requirement, either by striking it off or referring it to an officer to reduce it to proper dimensions. *Agque vs. R. R.*, 33 W. N., 573.

XIII. NEGLECT TO FILE. If the plaintiff omits to file his statement till after the time prescribed by the act, it seems he may still proceed, as if he had declared at common law. *Foreman vs. McFerrin*, 13 S. & R., 290.

XIV. NEGLECT TO GIVE NOTICE OF FILING. Under the act of May 25, 1887, neglect to serve a copy on the defendant of the statement of claim in *assumpsit* filed will prevent the plaintiff from taking judgment for want of an affidavit of defence. Fifteen days' notice is required by that act. *Marlin vs. Waters*, 127 Pa., 177.

XV. NEGLECT TO GRANT AMENDMENTS. The plaintiff may amend his statement of claim after a judgment has been entered in favor of the defendant on a plea in bar, if the application for the amendment is made in good faith. *Jones vs. Linden*, 1 Pa. Dist., 725.

XVI. NEGLECT TO SERVE COPY. Where the plaintiff serves a copy of the statement upon the defendant personally, and not upon the attorney of record, a judgment entered for want of an affidavit of defence will be opened, if it appears that the defendant's attorney had no actual notice of the filing of the statement. *Weir vs. Craige*, 13 Pa. County, 46.

Steamboats. See "STEAMSHIPS."

I. NEGLECT IN APPROACHING WHARF. 1. A passenger in a ferry-boat was standing at the door inside the cabin while

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the boat was nearing the wharf. The boat struck the pier with such force as to throw the passenger to the floor, whereby she sustained injury. Held, that the plaintiff was not guilty of contributory negligence, and a referee could give damages.

Camden & Phila. Ferry Co. vs. Monaghan, 10 W. N., 46.

2. It is negligence on the part of the engineer of a ferry-boat to allow it to strike the slip with violence, whereby a passenger, who was standing on the deck ready to land, was thrown down and injured. *Monaghan vs. Ferry Co.*, 9 W. N., 368.

II. NEGLIGENCE IN BUILDING. Where there has been delay in completing a steamboat in the time agreed upon, the measure of damages would be, not what it would cost the party to hire another boat for the time, but what would be the ordinary hire of such boat; and in case of defective work, what would be the cost of repairs, and the ordinary hire of a boat during the time necessary to make them. *Brown vs. Foster*, 51 Pa., 165.

III. NEGLIGENCE IN CONSTRUCTION. In every insurance upon a vessel, there is an implied warranty upon the part of the assured, that at the time of sailing she shall be seaworthy for the voyage. The hull shall be staunch and tight, and the machinery properly constructed, and of sufficient power. *Myers vs. Ins. Co.*, 26 Pa., 192.

IV. NEGLIGENCE IN EXTINGUISHING FIRES. Where the cargo of a vessel takes fire without the fault of the crew, the damage done by applying water, or by tearing up the deck to extinguish the flames, is general average. *Nimick vs. Holmes*, 25 Pa., 366.

V. NEGLIGENCE IN JUMPING FROM BOAT. If an accident happened, resulting in death to a passenger on a ferry-boat, by jumping from it before the vessel reached the wharf, his widow cannot recover damages, for the passenger himself was guilty of negligence. *Fish vs. Ferry Co.*, 4 Phila., 103.

VI. NEGLIGENCE IN LOCATION OF GANG-PLANK. The fact that the gang-plank of a steamboat is left lying flat on the deck of the vessel opposite a staircase, when not in use, will

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not suffice in itself to entitle a passenger who has stumbled over the plank to recover damages from the owner of the steamboat for the injury sustained. A gang-plank is a necessary appliance of a steamboat, and there is no other place for it to lie except the deck of the boat in full view of the passengers. *Seddon vs. Bickley*, 153 Pa., 271.

VII. NEGLIGENCE IN MANAGEMENT. Common carriers are exempt from all damage resulting from an act of God. Such divine agency may be a storm, a sudden squall, an inundation, marine volcano or lightning; and not merely from their effects, such as changes in currents, raising of shoals, bars, etc. The cause of the disaster must be direct and violent; hence a thick fog is not included. Nor is the stranding of a boat on a bar an act of Providence, nor loss occasioned by an obstruction in a river. Where a collision occurs on the water between two boats, it is a peril of the sea or river, although not occasioned by an act of God, and, in the absence of negligence, neither vessel is liable to the other. *Hays vs. Kennedy*, 3 Grant, 351.

VIII. NEGLIGENCE IN PASSING EACH OTHER. Before a boat has a right to pass another, she must take care that the occasion is proper in regard to the safety of both boats. The leading boat should answer the signal of the other, answering her intention to pass, and in no case attempt to cross her bow and crowd upon her course. *Panther vs. The Ajax*, 19 Pittsburg Journal, 21.

IX. NEGLIGENCE IN PASSING SAILING VESSEL. It is the duty of a steam vessel, when about to pass a sailing vessel, to observe closely the course of the latter, and to regulate her own movements accordingly. *Bartleson vs. The Cynthia*, 14 Phila., 411. *Express Tilton vs. Steamer Harrisburg*, *Idem*, 499.

X. NEGLIGENCE IN STEERING. 1. One who, in a sudden emergency, acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence. A person while attempting to row a boat across a river, lost control of it and it swung around the bow of one of

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several barges in the tow of a steamboat, resulting in the drowning of the oarsman. Held, that the omission of the captain of the steamboat to back the wheel while the deceased was in the dangerous position may have been a mistake, but it was not carelessness. *Brown vs. French*, 104 Pa., 604.

2. The rule that a steamer must change her course for a sailing vessel because she has superior powers of locomotion, does not apply to a row-boat, and a steamer is not bound to change her course to avoid a row-boat. *Phila. & Reading R. R. vs. Adams*, 89 Pa., 31.

XI. NEGLECT IN TOWING BOAT. The owners of a steamboat employed in towing boats or rafts is not a common carrier. The law is different in Louisiana, but in New York the law in this respect is like that of Pennsylvania. The owners of steamboats who undertake to tow vessels, are responsible only for ordinary skill, care and diligence. *Leonard vs. Hendrickson*, 18 Pa., 40.

XII. NEGLECT IN TOWING FLATS. Steamboats employed in towing flats and other craft are not liable, as such, as common carriers, but only as bailees for hire, and bound only to ordinary care, skill and diligence. In case of mutual negligence, where damage occurs, neither party can recover damages. *Taylor vs. Campbell*, 1 Pittsburg, 459.

XIII. NEGLECT IN TRANSPORTING GOODS. 1. The owners of steamboats transporting goods or freight, are common carriers, and are liable for all losses in the course of their employment as such, except those occasioned by the act of God or the public enemy. There is a different principle in the case of a factor or consignee; he is responsible only for negligence. *Harrington vs. McShane*, 2 W., 446. 2. Though a mere agent, without interest, with whom a contract is made on behalf of another, cannot support an action therein, yet when he has a beneficial interest in the performance of the contract or a special property, he may support an action in his own name. Injuries to the vessel by contact with floating ice in the river, whereby the cargo became wet and consequently

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injured, are not such perils of navigation as would exempt the carrier from liability. *Steamboat Co. vs. Atkins*, 22 Pa., 524.

XIV. NEGLIGENCE OF CAPTAIN. Where the insured, the master of a river steamboat, caused a barrel of turpentine to be thrown in the furnace to increase the head of steam, whereby the vessel was set on fire and destroyed, he cannot recover his insurance. Though an insurance policy may protect against losses through mere negligence and carelessness, yet it will not protect against the misconduct of the party insured. *Citizens' Ins. Co. vs. Marsh*, 41 Pa., 386.

XV. NEGLIGENCE OF CREW. If, in times of danger, the crew should refuse to perform their duty, they forfeit all the wages of the voyage. Every insurance on a vessel is based upon the condition, that the owners have employed a competent and faithful crew bound to exert themselves for the safety of the vessel. In the event of the boat striking a rock and sinking, the provisions and wages of the crew cannot be charged against a company that insured the boat, but where other men are procured to save or repair the injured vessel, the insurers are liable for the extra expense. *May vs. Ins. Co.*, 19 Pa., 312.

XVI. NEGLIGENCE OF ORIGINAL CARRIER. 1. The owners of a steamboat, on which goods are reshipped, are not liable for damages done to them on another boat by which they were originally shipped. *Wilson vs. Hays*, 2 Pittsburgh Journal, 200. 2. Where goods are shipped by a steamboat, with the right of reshipment, and there is a provision in the bill of lading that the owners of the second boat shall not be liable for injury done on board the first, the owners of the second boat are not rendered liable for such injury, because they compelled payment of the entire freight before delivery of the goods. *Wilson vs. Harry*, 32 Pa., 270.

XVII. NEGLIGENCE OF THE PILOT. 1. In an action against the owners of a steamboat for injury to barges from collision, evidence may be given of the incompetency of the pilot of the steamer. Declarations of the pilot, unless made before or at

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the time of the collision, and so connected with it as to make them part of the *res gestæ*, are inadmissible. The narrative of an agent of a past occurrence is not evidence against his principal. A steamer ascending the river is under the control of the pilot and bound to keep clear of barges. *Bigley vs. Williams*, 80 Pa., 107. 2. Where a collision happens between two vessels by reason of the fault of the pilot of one of them, he and his employers are both liable, jointly and severally, and if the employers pay the damage, they have the right of recovery from the pilot. A different rule exists as to public licensed pilots of maritime harbors. The pilot alone is liable to third persons. *Campbell vs. Williams*, 1 Phila., 198. 3. If a river steamer runs upon a stone and knocks a hole in her hull, the owners, as carriers, will not be discharged from liability by virtue of the clause in the bill of lading: "The dangers of the river only excepted," but must prove due diligence and proper skill used to avoid the accident, and that it was unavoidable. *Whitesides vs. Russell*, 8 W. & S., 44.

XVIII. NEGLIGENCE OF WHARF OWNERS. A city owning a wharf and receiving wharfage from the owners of a steamboat moored there, is responsible for injury to the boat from projecting piles of iron on the wharf, against which the boat struck and was injured. *Pittsburg vs. Grier*, 22 Pa., 54.

XIX. NEGLIGENCE RESULTING FROM FIRE. The act of congress of March 3, 1851, exempts owners of any ship or vessel from liability for loss of goods from fire on such vessel, unless such fire is caused by the design or neglect of such owners. This act does not apply, however, to any vessel used in rivers or inland navigation. Where dangers by fire are not excepted in the contract to carry freight, the owners of the steamboat are liable for loss therefrom. *McBride vs. Smyth*, 54 Pa., 251.

XX. NEGLIGENCE RESULTING IN COLLISION. 1. Where, in case of collision, with loss, there is a reasonable doubt as to which party is to blame, the loss must be sustained by the one upon which it has fallen. *Bayard vs. The Coal Valley*, 3 Pittsburg, 165. 2. Where carriers contracted, by their bill

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of lading, to deliver at the place of destination safely and in good order, "the unavoidable dangers of the river navigation and fire excepted," and the boat was run into and sunk, and the goods lost, without fault on the part of her master or crew, it was held, that the plaintiffs could not recover. "Unavoidable dangers" mean such accidents as are unavoidable by the carrier, supposing he has exercised all the precaution, care and skill that the law usually demands of him, and this he must show. *Hays vs. Kennedy*, 41 Pa., 378. 3. Steamboats, having means of avoiding injury which other boats do not possess, the law exacts of them exertions proportionate to their powers. In the present case, a collision occurred at a bend in the river, between a steamboat in motion and a coal boat moored to the shore. *Holmes vs. Watson*, 29 Pa., 457. 4. A schooner, while at anchor, with the proper lights up, was run into and sunk by a steamboat. Held, that the steamboat was liable for the loss. The United States district court has jurisdiction in admiralty of a libel for damages for the death of a seaman, whose death was the direct result of the negligence of a steamer in causing a collision on the high seas. *McCloskey vs. Steamship Achilles*, 13 Phila., 463. 25 *Pittsburg Journal*, 49. *Coggins vs. Helmsley*, 13 Phila., 464. 5. Where, on a dark night, a steamboat in Delaware Bay had its lights ignited which could be readily seen, it was the duty of an approaching bark, which had no lights exposed, to give a wide berth to the steamboat. The rule of passing to the right, in cases of vessels meeting on the same line, is founded on the supposition that each party can see the other. The court cannot establish any rule to bind vessels navigating the high seas to carry signal lights, but when one party does this and the other does not, we will treat the dark boat as the wrong-doer, and liable to make reparation. *Palmer vs. The Osprey*, 1 Phila., 401. 6. In cases of collision of vessels, when both parties are guilty of negligence, the one cannot recover for damages arising therefrom from the other, although the former was guilty of less negligence

Steamboats—Continued.

than the latter. *The Panther vs. The Ajax*, 3 Pittsburg, 328. 7. Where a collision between two boats is the result of mutual negligence, in a suit against both, the damage resulting to the owner of the cargo in one of the boats will be equally divided between the vessels. *Phœnix Ins. Co. vs. The Sam Brown*, 34 Pittsburg Journal, 250. 8. However important it may be to the steamboat companies and convenient to the public, that their boats should keep up their speed, the law finds no excuse for a collision. The force which moves her is governed by her own will. She determines its direction and intensity, and is at rest when the engineer commands. There is no hardship for her in the rule that she must give way to a sailing vessel. *Red Bank Co. vs. The Gandy*, 1 Phila., 150. 9. Where a sailing vessel had failed to exhibit a torch upon the approach of a steamboat, but exhibited a green light, and a collision followed, it was held that both vessels were in fault, and a decree was entered in favor of the schooner for half damages, with costs. *The Margaret vs. The Catherine Whiting*, 26 Pittsburg Journal, 86.

XXI. NEGLECT, RESULTING IN EXPLOSION. In an action for damages for personal injuries to a passenger by an explosion on a steamboat, on proof of the injuries, the burden is upon the defendants to show that the explosion was not due to the negligence of the company or its employees. *Spear vs. R.R.*, 119 Pa., 61.

XXII. NEGLECT TO ABATE SPEED IN A FOG. A steamer is guilty of negligence in running at full speed when the night is dark and the atmosphere thick and foggy. *McLaren vs. The Pennsylvania*, 18 Phila., 525.

XXIII. NEGLECT TO ALTER COURSE. The rule that every steam vessel approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse, does not require such vessel to alter her course for a row-boat, which, of all water craft, is most easily handled. A few strokes of the oars, in the hands of competent men, will take a row-boat out of the path of an approaching steamer.

Steamboats—Continued.

The latter is confined to a channel, often narrow, whilst the row-boat requires but a few inches of water to float it. *Fischer vs. Ferry Co.*, 124 Pa., 159.

XXIV. NEGLIGENCE TO CONSTRUCT. Where a steamship in course of construction is burnt, through the negligence of the watchman of the builders, but not imputable to the latter, the contract in this case absolved them from liability. *Cumberland Steamboat Co. vs. Dialogue*, 1 W. N., 475.

XXV. NEGLIGENCE TO DELIVER FREIGHT. 1. A transportation company may make a contract for carrying beyond their line, and is responsible for the carriage of goods contracted for. *Baltimore Steamboat Co. vs. Brown*, 54 Pa., 77. 2. The owners of a steamboat are liable, as common carriers, for the loss of freight occasioned by collision with another boat, even though they were not at fault. *Hayes vs. Kennedy*, 2 Pittsburg, 262. 3. Where the receipt of the owner of a steamboat for goods shipped thereon excepted the dangers of fire while on board the vessel, and the goods were consumed by fire, the burden of proof is on the shipper to show negligence on the part of the steamboat owner or seamen. *Patterson vs. Clyde*, 67 Pa., 500.

XXVI. NEGLIGENCE TO DISPLAY SIGNAL LIGHTS. Masters of steamboats must carry, between sunset and sunrise, one or more signal lights. *Elliott vs. The Nelson*, 1 Pittsburg, 6.

XXVII. NEGLIGENCE TO EMPLOY PILOTS. The act of congress of August 3, 1852, holds the officers of vessels to the strictest accountability. A captain has no right to assume the position of a licensed pilot, and is liable to a penalty for so doing. *United States vs. Steamboat Science*, 5 Phila., 257.

XXVIII. NEGLIGENCE TO GIVE WAY TO SAILING VESSELS. 1. The law imposes on a vessel having the wind free the obligation of getting out of the way of a vessel close-hauled, and of showing it had done so. Steam vessels are always considered as having the wind free, and when in motion must always give way to sailing vessels, as the former have control of their own movements by means of their motive powers.

Steamboats—Continued.

Lyle vs. The Conestoga, 5 Clark, 95. *Baker vs. The Hibernia*, *Idem*, 48. *Red Bank Co. vs. The Gandy*, *Idem*, 482. 2. It is a rule founded in reason, and long recognized in the admiralty, that on the open seas vessels going free shall give place to those that are going close-hauled. A steamer is to be regarded as a vessel going free, and must give way to a sailing vessel going close-hauled. A vessel being close-hauled and meeting a steamer, is not at liberty to change her course. *Sanderson vs. The Columbus*, 4 Clark, 493.

XXIX. NEGLECT TO LIMIT THE NUMBER OF PASSENGERS. In a suit against a steamboat to enforce the penalty for carrying an unlawful number of passengers, it appearing that the persons in excess of the allowed number aboard the boat were intruders against the will of the officers of the boat, held, that the penalties were not incurred. *Poor vs. The Geneva*, 33 Pittsburg Journal, 298.

XXX. NEGLECT TO NOTICE FOG SIGNAL. A steamship, upon hearing the fog signal of an invisible vessel, ought to stop at once, without waiting for her to come into sight. *Ship Anna vs. Golden Horn*, 14 Phila., 521.

XXXI. NEGLECT TO PROTECT PASSENGERS. 1. In the passage-way on a steamboat wharf was a swinging door, the upper half of which was of glass without bar or guard before it. A person on a ferry-boat passing out of the cabin allowed the door to swing back, when the plaintiff, putting out his hand to stop it, broke the glass in the door cutting his hand and arm. In an action for damages against the ferry company, there was no evidence of negligence on the part of the company in the construction or use of the door or its want of fitness for the purpose for which it was applied, and hence the court ordered a compulsory nonsuit. *Hayman vs. R. R.*, 118 Pa., 508. 20 W. N., 466. 2. The owners of a steamboat cannot be held liable for the act of a sailor in hastily pushing to a door and thereby crushing the finger of a passenger who had negligently placed her hand in the space between the door and its frame. Every child is taught to open and shut a door

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by its handle, and not place its finger in the crack by the hinges. *Hannigan vs. Navigation Co.*, 23 W. N., 576.

3. Evidence showing that an explosion from some unknown cause upon a steamboat, resulting in the death of a passenger, raises a presumption of negligence, and the carrier is responsible in damages, unless he can satisfy the jury that he exercised due care. *Spear vs. R. R.*, 5 Pa. County, 395.

XXXII. NEGLIGENCE TO REMOVE SNOW FROM DECK. It is not negligence on the part of a ferry company to fail to remove the snow from its deck during the progress of a snow-storm, even if the snow renders the deck slippery and difficult to walk upon. *Feam vs. Ferry Co.*, 143 Pa., 122.

Steam Boilers.

NEGLECT OF MILL-OWNERS. One who is exercising a public business which requires the use of a steam engine, is responsible for injury to another, which is the consequence of its insufficiency. *Spencer vs. Campbell*, 9 W. & S., 32.

Steam Engine.

NEGLECT IN WORKING. To work the engine under an extraordinary head of steam is an act of rashness. The operator is bound, not only to use due care, but to possess a competent share of skill. *Spencer vs. Campbell*, 9 W. & S., 32.

Steamships.

I. NEGLIGENCE IN REPRESENTATIONS OF AGENT. The representations made by a foreign agent of a steamship company as to transportation of passengers and baggage from port to port are binding on the company, and if a part of the carriage was performed by other corporations, resulting in the loss of a trunk of a passenger, the plaintiff is justified in inferring that such subordinate carriers were the agents of the defendant. *Maskos vs. Steamship Co.*, 11 W. N., 42.

II. NEGLIGENCE IN UNLOADING CARGO. Where a steamship company made a special contract with a stevedore to unload

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its cargo, who used his own machinery and planks to do so, and by his carelessness occasioned an accident to a seaman, held, that the question whether the stevedore was an agent of the company or an independent contractor, and whether the plaintiff was a fellow-servant in a common employment, were properly submitted to a jury. *Hass vs. Phila. & Southern Steamship Co.*, 88 Pa., 269.

III. NEGLECT OF BAGGAGE OF PASSENGER. An ocean steamship company is not responsible as a common carrier or an innkeeper for the baggage of a passenger which he keeps in his own possession in his state-room, but must answer in such cases for its negligence, like other bailees for hire. *American Steamship Co. vs. Bryan*, 83 Pa., 446.

IV. NEGLECT OF CAPTAIN. A captain of a passenger steamer is empowered to receive passengers on board, but it is necessary to this power that he be authorized to admit that his principal or any servant of his principal has been guilty of negligence in receiving them. *American Steamship Co. vs. Landreth*, 102 Pa., 136. 108 Pa., 264.

V. NEGLECT TO DELIVER GOODS. After goods have been landed by a steamship on its wharf, the owner or consignee has a reasonable time within which to remove them, during which the liability of the carrier as an insurer continues. After such reasonable time, the liability of the carrier becomes modified, and it is only bound to exercise ordinary care to secure the safety of the goods. *National Line Steamship Co. vs. Smart*, 107 Pa., 492.

VI. NEGLECT TO PROVIDE FOR SAFETY OF PASSENGERS. The neglect of a steamship company to provide a hand-rail in the saloon which passengers might grasp in the event of a sudden lurch of the vessel, is negligence, and declarations of the captain, made at the time of an accident, that a hand-rail was needed, and the fact that subsequently he had one made, are part of the *res gestæ*. *Landreth vs. Steamship Co.*, 11 W. N., 416.

Stocks.

I. NEGLECT BY GAMBLING IN. 1. Where transactions take place in stocks on margins, and none are actually bought or sold or intended to be, such transactions are illegal, immoral and against public policy. The courts will not enforce such contracts. *Collins vs. Nevin*, 30 *Pittsburg Journal*, 238. 2. Whether a contract is a wagering one, is a question for the jury. Notes given to a broker to cover losses incurred in stock gambling operations are void. *Fareira vs. Gabell*, 89 *Pa.*, 89. 6 *W. N.*, 490. 3. A wagering contract is one in which the parties in effect stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except therefrom; and whether the contract is a wagering one or not, is for the jury to decide, unless the entire contract is in writing. *Gaw vs. Bennet*, 153 *Pa.*, 247. 4. A judgment entered upon a bond with warrant of attorney originally entered to cover margins in a stock gambling transaction, will not be enforced in the hands of an assignee. The giving of a declaration of no set-off by the obligee will not preclude him from defending against an assignee who has never seen such declaration. *Griffith's Appeal*, 16 *W. N.*, 249. 5. Purchases and sales of stock are not necessarily gambling transactions, though made partly or wholly on credit. *Hopkins vs. O'Kane*, 36 *W. N.*, 475. 6. There is no presumption that a transaction in stocks, upon a margin, is a gambling transaction. If the stock be actually bought and delivered, the transaction is legitimate. *McNaughton vs. Haldeman*, 5 *Delaware Co.*, 278. 7. A transaction in stocks by way of margin, settlement of differences, and payment of gain and loss, without intending to deliver the stocks, is a mere wager. *Maxton vs. Gheen*, 75 *Pa.*, 166. *Waugh vs. Beck*, 34 *Pittsburg Journal*, 197. *North vs. Phillips*, 89 *Pa.*, 250. *Peters vs. Grim*, 3 *Northampton Co.*, 121. 8. Money paid in settlement of differences in stock transactions on margins cannot be recovered back under the act of April 22, 1794, providing for the recovery of money lost at play. *Merriam vs. Grain Exchange*, 1 *Pa. County*, 478. 9. A purchase of stock for speculation even when done merely

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on margin, is not necessarily a gambling transaction. If there is not, under any circumstances, to be a delivery as part of and completing a purchase, then the transaction is a mere wager; but if there is, in good faith, a purchase, then the delivery may be postponed, or made to depend on a future condition, and the stock carried on margin in the meanwhile. *Peters vs. Grim*, 149 Pa., 163. 10. Where a minor enters into stock gambling operations through the medium of a broker, he can recover from the broker the amount of margin deposited with him. *Ruchisky vs. De Haven*, 97 Pa., 202. 11. A contract to purchase shares of stock without the intention to deliver or receive them, is a gambling contract. *Smith vs. Thomas*, 2 **York Record**, 14. 28 **Pittsburg Journal**, 309. 12. A purchase and sale of stocks, although upon speculation, is not a gambling transaction, if the stocks are delivered. A court of equity will not lend its aid to a party *sui juris* to recover the money he has invested and lost in stock gambling. *Stewart vs. Parnell*, 147 Pa., 523. 13. Promissory notes given as a margin to cover a rise or fall of stocks not actually paid for or delivered, are the instruments of a wager and cannot be recovered. *Swartz's Appeal*, 3 **Brewster**, 131. *Thomas vs. Smith*, 7 **W. N.**, 390. *Thompson's Estate*, 11 **W. N.**, 371. 14. Where stocks are not intended to be delivered, but settled for only in differences, it is a gambling contract and incapable of enforcement. *Thompson's Estate*, 15 **Phila.**, 532.

II. NEGLECT IN ASSIGNING CERTIFICATES IN BLANK. 1. It is the duty of the holder of a certificate of stock to guard against the fraudulent insertion of a name in the instrument, signed in blank. *Aull vs. Colket*, 2 **W. N.**, 322. 2. A corporation is trustee of its stockholders, and is bound to proper vigilance and care in the transfers of stock. Where the power of transfer was dated thirteen years before, it was a suspicious circumstance, and should have led to inquiry. If, however, there was negligence on the part of the owner of the stock in placing the certificates in the hands of a party with the blanks endorsed uncanceled, the party could not recover for a fraud-

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ulent transfer. Where one of two parties, who are equally innocent of actual fraud, must lose, the one whose misplaced confidence has occasioned the loss shall not throw it upon the other. *Penna. R. R.'s Appeal*, 86 Pa., 80. 3. If the owner of stock voluntarily give certificates with blank assignment and power to make transfers to his brokers, who betray the confidence reposed in them, such owner must suffer the loss, rather than innocent strangers. The principle applies to pledges of stock, and one who purchases from the pledgee may hold against the pledgor. *Wood's Appeal*, 92 Pa., 390.

III. NEGLIGENCE IN BUYING ON MARGIN. 1. An agreement for the purchase of stocks on margins, without any intention of delivering or receiving the stock, is a gambling contract, which will not support an action between the parties thereto. *Ports vs. Dunlap*, 110 Pa., 177. 2. A transaction in stocks or other commodities by way of margin, settlement of differences, and payment of gain or loss, without intending to deliver the commodities sold, is a wagering or gambling transaction and unlawful. *Waugh vs. Beck*, 114 Pa., 422.

IV. NEGLIGENCE IN DISPOSING OF. Directors of a railroad company have no power to dispose of its stock at less than the price fixed in the charter. A sale at a less price is void in law. *Sturges vs. Stetson*, 3 Phila., 304. *Fusich vs. Sturges*, *Idem*, 312.

V. NEGLIGENCE IN FRAUDULENTLY ISSUING. The president of a railway company fraudulently issued certificates of stock, properly signed and sealed, in excess of the amount authorized by law. Held, that purchasers of such stock, or holders of it as collateral security, were entitled to relief as *bona fide* purchasers on the faith of certificates issued by the company. Impossibility of specific performance is no reason for dismissing the bills. *Willis vs. Fry*, 13 Phila., 33. *Willis vs. Philadelphia & Darby R. R.*, 6 W. N., 461.

VI. NEGLIGENCE IN SALE. 1. The ordinary measure of damages in a breach of contract for the sale of stock is the difference between the market price at the time of the breach

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and the contract price. It is not necessary to resell the stock on the market to fix the amount of damages. *Mobley vs. Morgan*, 34 *Pittsburg Journal*, 201. 2. The measure of damages for a breach of contract to replace borrowed stock is the highest price it has reached between the breach and the trial. *Musgrave vs. Beckendorff*, 53 *Pa.*, 310.

VII. NEGLIGENCE OF OWNER. Where an owner of stock leaves his certificates with a broker, accompanied with a blank power of attorney to sell and transfer the same, and the broker pledges them for his own debt to a pledgee without notice of the fraud, the owner of the stock is estopped from setting up his ownership against such innocent pledgee who has advanced money thereon. *Burton's Appeal*, 93 *Pa.*, 214.

VIII. NEGLIGENCE OF STOCKHOLDERS TO PAY ASSESSMENTS. The original stockholders of a company are liable for the full par value of stock subscribed for by them, including assessments previously due but not called for until after the assignment of the stock. That such transfer was made by the stockholders in good faith and without knowledge of the corporation's insolvency, is immaterial. *Sharon Savings Bank vs. Messersmith*, 8 *W. N.*, 91.

IX. NEGLIGENCE TO DELIVER. 1. A contract to purchase shares of stock without the intention to deliver or receive them is a gaming contract, and is not enforceable at law. *Bona fide* time contracts about real subjects of purchase and sale are valid, although they may be affected by the rise and fall of the market; for the losing party has something for his money. *Brua's Appeal*, 55 *Pa.*, 294. 2. A contract to sell "short" shares of stock, where there is to be no delivery, is a mere gambling contract and void. *Dickson vs. Thomas*, 10 *W. N.*, 112. 3. Where there is no trust relation between the parties and no obligation to deliver specific stock, the measure of damages for failure to deliver stock is the market value of the stock on the day it should have been delivered, with interest to the day of trial. *Huntingdon R. R. vs. English*, 86 *Pa.*, 247. *North vs. Phillips*, 89 *Pa.*, 250. 4. A trans-

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action in stocks by way of margin, settlement of differences and payment of gain or loss, without intending to deliver the stocks, is a mere wager. It will not do to say, however, because there is so much gambling in stocks, that every sale, "short" as it is termed, is, *ipso facto*, a wager. *Maxton vs. Green*, 75 Pa., 168. 5. When there is a duty on a party to deliver stocks or securities at a particular time, which duty has not been fulfilled, he is liable for the highest price in the market between that time and the trial. *Neiler vs. Kelley*, 69 Pa., 403. 6. When stocks are bought and sold, although upon speculation, if they are to be delivered, it is not a gambling transaction. *Bona fide* time contracts for sales of stocks are legitimate. *Smith vs. Bouvier*, 70 Pa., 325.

X. NEGLECT TO ENDORSE CERTIFICATE. The bare fact of the loss of a certificate of stock, endorsed in blank, is not evidence of such culpable carelessness on the part of the holder as would enable the finder to transfer the ownership of it. Where one of two innocent men must suffer loss, the rule is, *prior in tempore, prior in jure*. *Biddle vs. Bayard*, 13 Pa., 150.

XI. NEGLECT TO SELL. Where a creditor holds stock, as collateral security for the payment of a note, he is not bound, at the maturity of the note and its non-payment, to sell the stock without notice from the debtor directing him to do so. *O'Neill vs. Whigham*, 87 Pa., 394.

XII. NEGLECT TO TENDER. Where there is no formal tender of the stock, the measure of damages, in an action for breach of contract to purchase, is the difference between the contract price and the market value of the stock at the time of delivery, with interest. *Corser vs. Hale*, 149 Pa., 274.

XIII. NEGLECT TO TRANSFER. A mandamus for the transfer of stock will not be granted where the grantor has an adequate remedy in an action on the case for damages. *Birmingham Ins. Co. vs. Comm.*, 92 Pa., 72.

Storage.

I. NEGLECT TO PAY. An implied contract to pay for storage will arise where one person leaves his goods upon the property of another. A mere notice by the owner to remove the goods not complied with, will not prevent the owner from electing to permit the goods to remain and recovering storage. *Grove vs. Barclay*, 106 Pa., 155.

II. NEGLECT, RESULTING IN LOSS. The law will not impute negligence on the part of the bailee in the loss of an article left in storage, until the contrary be shown. The bailee, however, must clearly prove at the outset the manner in which the goods were lost. *Clark vs. Spence*, 10 W., 335.

Storekeepers.

I. NEGLECT IN REMOVING GOODS. The proprietor of a store who has sold his waste paper to a dealer, who sent his employees to take it away, is not responsible for the negligence of such employees while engaged in removing it. The immediate employer is alone responsible for the acts of his servants. In the present case, a passer-by was struck and injured on the sidewalk by a bag of waste paper thrown from the window of the store. *McCullough vs. Hemingway*, 16 Phila., 158.

II. NEGLECT IN SELLING TO EMPLOYEES. The act of April 29, 1874, was enacted to do away with what were termed company stores, and the withholding of wages due employees to pay store bills. But it was not the purpose of the act to restrict employees from dealing in such stores if they preferred. *Evans vs. Coal Co.*, 6 Kulp, 351.

III. NEGLECT TO PROTECT PROPERTY OF CUSTOMERS.

1. The proprietor of a clothing house is not liable for the loss of a pocket-book from a vest taken off and laid on the counter by a customer at the request of a salesman, while he tries on a new vest. *Goff vs. Wanamaker*, 7 Lancaster Review, 128. 25 W. N., 358. 2. Where valuables of a customer are stolen from the compartment of a clothing store, where such customer has changed his clothes, the proprietor is liable, as it was his duty to provide a safe place of deposit for valuables. *McCollin vs. Reed*,

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16 W. N., 287. 3. A shopkeeper by opening his store invites the public to transact business there, and impliedly contracts that no harm or damage that could reasonably be averted shall happen to the persons of those so coming or to such property as they usually carry with them. If a customer, while making or examining his purchases, be invited by the dealer to lay aside his watch, money or other property which he usually carries with him, he has committed such goods to his custody. In the present case, a party purchasing and trying on a suit of clothes, placed his watch, at the suggestion of the salesman, in a drawer in the store, from which it was feloniously abstracted. *Woodruff vs. Painter*, 150 Pa., 91.

Street Cars. See "RAILWAYS."

Streets.

I. NEGLECT BY ENCROACHING UPON. An encroachment on the streets of a city is a nuisance which will be enjoined at suit of the city. Time is no bar to such action. *City vs. Friday*, 6 Phila., 275.

II. NEGLECT BY ERECTION OF NUISANCES. The construction and maintenance of a market-house on the public highway is a nuisance, and is as liable to punishment when done by a public corporation as by private individuals. *Wartman vs. Philadelphia*, 33 Pa., 202.

III. NEGLECT BY REPAIRING. When corporate officers repair the streets of a borough, they do not subject the borough to an action by an individual for consequential injury to his property by such improvement. *Green vs. Reading*, 9 W., 382.

IV. NEGLECT IN CHANGING THE GRADE. 1. By the act of May 24, 1878, where borough authorities change the grade or lines of any street or alley, or in any way alter or enlarge the same, thereby causing damage to the owners of land abutting thereon, without the consent of the owners, such owners shall be entitled to compensation. *Beltzhoover Bor-*

Streets—Continued.

ough vs. Gollings, 101 Pa., 294. 2. The owner of property abutting on a public street is entitled to damages for change of grade, although he has no title to land occupied by the street. *Hobson vs. Philadelphia*, 150 Pa., 595. 3. Under the constitution of this state, a property holder is entitled to recover damages for an injury caused by the change of grade of a street, although the change of grade was made at his request. *Lewis vs. Darby*, 166 Pa., 613. 4. Where a city changes the grade of a street, it is bound to compensate abutters for consequential injuries to their property. *Wilkesbarre Manuf. Co. vs. Wilkesbarre*, 5 Kulp, 333. *Conemaugh vs. Schwable*, 1 W. N., 55. *Turner's Petition*, 4 W. N., 443. *Kennedy vs. Ry. Co.*, 2 W. N., 505.

V. NEGLECT IN CONSTRUCTING A CROSSING. In an action by a foot passenger against a municipality for injuries resulting from a defect in the flagstones of a crossing, it is error to leave to the jury whether there was any necessity for the borough to construct such crossing. The jury can only decide, whether it was constructed in so negligent a manner as to cause the injury. *Easton Borough vs. Neff*, 102 Pa., 474.

VI. NEGLECT IN CONTRACTS FOR PAVING. Contracts for paving, lawfully made at the discretion of municipal authorities, are binding upon the landowners charged with the payment of the price of paving, though injudiciously made; but they are entitled to have such contracts performed substantially in all things according to their terms. *Pepper vs. Philadelphia*, 114 Pa., 96.

VII. NEGLECT IN CROSSING. Due and ordinary care is to be exercised in crossing public streets. A man is bound to look where he is going, when he is about to cross a street where horses, wagons and cars have equal rights with himself. *Schmidt vs. McGill*, 120 Pa., 412. *Buzby vs. Traction Co.*, 126 Pa., 559.

VIII. NEGLECT IN DEED TO ABUTTING LOTS. The grantee of a town lot abutting on a street opened for public use takes a fee to the centre, although the description adopts the sides as

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the boundary. The grantees are entitled to damages for the opening of such street. *Lehigh Street, In re*, 81x Pa., 85.

IX. NEGLIGENCE IN EXCAVATING. 1. In an action against a city for injuries in leaving unguarded an excavation in a highway, the responsibility cannot be shifted on a contractor, unless his contract, at the time of the accident, was in writing, and executed according to the requirements of the act of June 1, 1885. *Hepburn vs. Philadelphia*, 149 Pa., 335. 2. A municipal corporation is not liable for damages resulting from the digging of a trench in one of its public streets by a private individual, under a license from the authorities, for the purpose of connecting with the main conduit water pipes, and neglecting properly to fill up the same. *West Chester vs. Apple*, 35 Pa., 284.

X. NEGLIGENCE IN GRADING. 1. Damages for injury to land by grading a street belong to the owner at the time of the grading. *Bauman vs. New Castle*, 12 Pa. County, 22. 2. A city is not bound for the mere consequences of filling up a street to grade it, if there be no negligence or want of proper skill in doing the work, causing an injury to the lot of the adjoining proprietor. *Broomall vs. Chester*, 2 Delaware Co., 252. 3. In an action for damages for a change of grade of a street, the measure of damages is the difference between the market value of the land before and after the change of grade. *Chambers vs. South Chester*, 4 Delaware Co., 346. 4. Municipal corporations are not answerable for any injury arising from the grade which they give to their streets. *Charlton vs. Allegheny City*, 1 Grant, 208. 3 Pittsburgh Journal, 285. 5. The commissioners of a district, who are authorized to grade and pave a public street, are liable for injuries accruing to a private right of way down which the water from the street is diverted. They are bound to make provision for carrying off waste water. *Comm'rs vs. Wood*, 10 Pa., 93. 6. Where a city so negligently graded a street by piling up dirt and stones adjacent to the wall of a landowner without strengthening it, so that the dirt slid down on the lot, held,

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that the city was liable for damages. *Gardner vs. Scranton*, 1 Pa. Dist., 805. 7. In an action of trespass against a contractor engaged in grading a street, to recover damages for filling in a part of defendant's lot and destroying his vegetables and fences, evidence that the lot was benefited by the act is inadmissible. *Hurley vs. Jones*, 165 Pa., 34. 8. The motives of city officials in changing the grade of streets, resulting in obstructing the flow of water, is not an object of inquiry, if they have authority to make such changes. *Mayor of Philadelphia vs. Randolph*, 4 W. & S., 514. 9. Where an ordinance directs the grading of a street, and fixes no grade for the same, the natural grade should be adopted. *Pittsburg vs. King*, 24 Pittsburg Journal, 189. 10. The cutting down of a street, consequent upon the reduction of a grade, whereby the buildings of an adjacent owner are injured, is not the subject of legal compensation in any form. *O'Connor vs. Pittsburg*, 18 Pa., 189. *Ridge St., In re*, 29 Pa., 391. 11. Where an excavation resulted in defendant's lot through the grading of a street, into which a policeman fell while in pursuit of a fugitive, and was killed, the court granted a compulsory nonsuit in an action brought by the widow of the officer, no negligence on the part of the defendant being shown. *Woods vs. Lloyd*, 1 Monaghan, 254.

XI. NEGLECT IN LOCATION. Grading and repairing a street and allowing property owners to build sidewalks along it, in accordance with an improper location, will not defeat the right of the borough to re-establish the original line of the street. *Kopf vs. Utter*, 101 Pa., 27.

XII. NEGLECT IN NOTICE OF OPENING. Where a statute requires publication of notice in a certain form prior to the opening of a street, the opening of it without such notice is unlawful, and subjects those engaged in it entering upon private property to an action of trespass. *Tyler vs. Bowen*, 1 Pittsburg, 225. 2 Pittsburg Journal, 204.

XIII. NEGLECT IN OBSTRUCTING. 1. An unreasonable

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obstruction of a highway is a nuisance, for which an indictment will lie. It is not, however, every obstruction on a highway that constitutes a nuisance *per se*. This is a question of fact for a jury. The erection of liberty poles is a custom sanctioned by time, and, unless forbidden by the authorities, is a lawful license incident to citizenship. If such pole was carefully erected from good material and sufficiently secured, so that a careful person would have apprehended no danger therefrom, it was not a nuisance *per se*, and damages could not be obtained from a municipality because during a heavy wind-storm the pole broke and injured a pedestrian. *Allegheny vs. Zimmerman*, 95 Pa., 287. 2. A borough is not liable for an injury which occurred by reason of the habitual dangerous occupation of the street in coasting, known to the borough authorities. The responsibility is upon the police, for whose neglect of duty the borough is not liable. *Brumbaugh vs. Bedford*, 40 Pittsburg Journal, 462. 3. The owner in fee of a property abutting on a public street has no right to erect anything upon or over the street to the inconvenience of travellers, who have the right to its unobstructed use. In the present case, the upper part of the building protruded over a portion of the street. *Comm. vs. Oberholtzer*, 3 Montgomery Co., 175. 1 Northampton Co., 169. 4. Making a speech in the street is not *per se* a nuisance, though a street may not be used, in strictness of law, for public speaking. The act may become a nuisance by the obstruction of the public highway. Those who draw crowds together in the street by window displays, music, parades, and the like, might be made answerable for many misfortunes, if the doctrine of nuisance be so extensive in its consequences. *Fairbanks vs. Kerr*, 70 Pa., 86. 5. It is negligence on the part of the authorities of a city, to permit a pile of loose flag-stones to remain heaped up on the side of the street, a menace both to drivers and pedestrians. *Farley vs. City*, 11 W. N., 136. 6. A person is not entitled to recover damages from a city for the obstruction of a street in which he lives, where the injury he suffers is common to the

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public generally. *Hobson vs. Philadelphia*, 155 Pa., 131.

7. An injunction, restraining the temporary blocking up a city street by hauling bulky articles over them, was dissolved in this case. *Second St. Ry. Co. vs. Morris*, Leg. Gaz. Report, 295.

8. Necessity justifies many actions which would otherwise be nuisances. No one has a right to throw wood or stones in the street; nevertheless, as building is necessary, building materials may be laid there for a reasonable time, and in a convenient manner. So may a merchant occupy a street with his goods; in like manner may the highways be temporarily

opened for the purpose of building vaults or laying drains. Hence the digging of a trench in a street, under a license, in order to lay a water pipe, is not such an act as of itself renders the parties engaged in it guilty of a public wrong. *Smith vs. Simmons*, 103 Pa., 35.

9. A man who leaves a heavy mass of timber standing unguarded in the streets of a city, is responsible for the injury that may result from its being thrown down by the wind on a passer-by. *Thomas vs. Hook*, 4 Phila., 119.

10. An ordinance declaring every unlicensed obstruction of any city street to be a common nuisance, and imposing a fine for its violation, will sustain a conviction for erecting any permanent structure in the highway, as in this case an advertising bill-board, which is an unlawful encroachment, notwithstanding space is left for the passage of the public. *Wilkesbarre vs. Burgunder*, 7 Kulp, 63.

XIV. NEGLECT IN OPENING. 1. A property owner, having a lot bounded on a plotted but unopened street, owns to the middle line of the street, and is entitled to damages when the street is opened, if any are suffered. *Forty-fourth Street, In re*, 19 Phila., 563. 2. In assessing damages for the opening of a street, the question is as to the market value of the land, and not as to what an isolated individual might be willing to give for it. *Geisinger vs. Hellertown*, 2 Northampton Co., 97. 3. When the legal proceedings for the opening of a street have not been fully consummated, and the city takes possession of private property and opens it for public use, it is a trespasser. *Hen-*

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derson vs. Chislett, 23 Pittsburg Journal, 5. 4. Municipal corporations are liable, under the constitution, to make compensation to private parties for injury to property by the construction of streets in front. *Lloyd vs. Philadelphia*, 17 Phila., 202. 5. Where a municipality opens streets, it is bound to give compensation, not only to those whose property is actually taken for the construction of the streets, but also to those whose property is injured or destroyed by the opening thereof. *Pusey vs. Allegheny*, 98 Pa., 522. 6. Where private property is injured by the opening of streets, the measure of damages is the difference between the market value of the premises as a whole tract, including the buildings, before the opening, and the market value after the opening, taking into consideration the probable advantages of the street to the premises as a whole. *Thomas vs. Lancaster*, 10 Lancaster Review, 113. 7. The right to open streets in the exercise of the commonwealth's right of eminent domain is not lost, because of a special act granting to a corporation perpetual immunity against the opening of streets through its cemetery. *Twenty-second Street, In re*, 102 Pa., 108. 8. The city of Philadelphia has no power to open a street, without paying or giving security to the owner of the land for damages. Nor has it the power to construct a culvert or sewer in a street, until it has been legally and properly opened. *Wistar vs. Philadelphia*, 71 Pa., 46.

XV. NEGLIGENCE IN PAVING. 1. The fact that a municipality has provided a well-paved street forty feet wide, upon each side of which is an additional roadway, twenty-two feet wide, and from twelve to eighteen inches higher than the central portion, is not evidence of negligence to go to a jury. *Johnston vs. Philadelphia*, 27 W. N., 415. 2. No legal duty is imposed upon a municipality to pave a street with a particular material, or in a particular method. *Megargee vs. Philadelphia*, 153 Pa., 340.

XVI. NEGLIGENCE IN REPAIRING. When a strip in the middle of a street has been macadamized under a city ordinance, and paid for by the owners of the abutting premises at

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the time, a subsequent owner cannot be compelled to pay the cost of a vulcanite pavement laid under a subsequent ordinance.

Philadelphia vs. Ehret, 153 Pa., 1.

XVII. NEGLECT IN TRAVERSING. 1. When a pedestrian is about to step into a cartway, he must remember that horses and vehicles have a right of way there, to which he must give due attention, or he will be barred of complaint as to the consequences. *Harris vs. Ice Co.*, 153 Pa., 278. 2. Negligence is the absence of care according to circumstances. If a street is rough and out of repair, a man in driving should exercise more care than if well graded and macadamized. One who is seated upon a loose box in a wagon and drives across a gutter which he knows is defective, is bound to use such care as a prudent man would exercise. *Lancaster vs. Kissinger*, 1 Pennypacker, 250. 11 W. N., 151. 3. Where a person knew of the dangerous condition of a street before he attempted to traverse it, held, that it was not such contributory negligence as would prevent his recovering damages for an injury resulting therefrom, where no other street was open for him to take. *Shaw vs. Philadelphia*, 159 Pa., 487.

XVIII. NEGLECT IN WIDENING. 1. Where a city ordinance provides for the widening of a street, it is usual to compel the owners of property to conform to the new line when they rebuild or alter the fronts of their properties. To compel them to do so at once would take buildings as well as land, and might bankrupt the city treasury. The party rebuilding is entitled to have a jury of view to assess the damages sustained by him. *Chestnut St., In re.*, 118 Pa., 599. 21 W. N., 54. 2. A town council cannot by a mere resolution take land to widen a street. They are liable in trespass. *Gilmore vs. Connelville*, 15 W. N., 342. 3. The city of Philadelphia, by an ordinance of councils, can lawfully increase the width of roadway and narrow the footway of any streets previously opened. *O'Neill vs. Armstrong*, 17 Phila., 273.

XIX. NEGLECT OF CONTRACTOR. A municipal corporation, granting to one a license to lay a private water pipe in

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the street is not liable to one injured by reason of the misuse or abuse of such license, whether the same be done by an independent contractor or by the licensee himself. *Susquehanna Depot vs. Simmons*, 112 Pa., 384.

XX. NEGLIGENCE OF LIABILITY FOR PAVING. Where borough streets have been originally paved at public expense, the cost of repaving or repair cannot be assessed against abutting lots. Macadamizing is original paving. *Greensburg vs. Laird*, 8 Pa. County, 608. *Hammett vs. Philadelphia*, 65 Pa., 146.

XXI. NEGLIGENCE OF NOTICE OF APPLICATION FOR PAVING CONTRACT. An ordinance in Philadelphia required, before a paving contract was awarded, that the applicant should advertise for two weeks his name, the place and quantity of paving, the addresses of signers who selected him, with a request to property owners to show cause why the contract should not be awarded him. Held, that the want of advertisement was fatal; the city could have waived irregularities; but jurisdiction over the lot owner could be obtained only under the prescribed rules. *Fell vs. Philadelphia*, 81 Pa., 58.

XXII. NEGLIGENCE OF NOTICE OF ASSESSMENTS FOR OPENING. To make the registered owner of property liable for the opening of a street, he must have notice of the assessment proceedings. *City vs. Woodward*, 13 W. N., 372.

XXIII. NEGLIGENCE OF RIGHTS OF ABUTTING OWNERS. It is a maxim of the common law, that the proprietors of land adjoining a highway have a fee in the soil of the highway to the centre of the road or street. A town council cannot dispose of or lease a public highway for private use. *Ball vs. Ball*, 4 Clark, 499. *Sunbury, In re*, Northumberland Co. News, 1.

XXIV. NEGLIGENCE OF VIEWERS. If all the viewers are not sworn, their proceedings will be deemed irregular. *Broad St., In re*, 7 S. & R., 444.

XXV. NEGLIGENCE TO AVOID OBSTRUCTIONS. Where there is a dangerous obstruction upon a street, of which a party is informed, in this case an icy sidewalk in front of an ice house,

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it is his duty to adopt a safe route, even if it is a short distance further, and not to attempt to cross the obstruction.

Fleming vs. Lock Haven, 15 W. N., 216.

XXVI. NEGLECT TO CLEAN. If by reason of elevating the centre of the wagon-way, the gutters become more liable to be obstructed from the washing and sliding down of dirt, it will require greater attention on the part of the borough officers to keep the gutters open; and if obstructed and neglected by the authorities to any man's injury, the borough is liable. *Zearfoss vs. Lansdale*, 1 Montgomery Co., 159.

XXVII. NEGLECT TO CLEAN CROSSINGS. A citizen who knows of the dangerous condition of the street crossing, and takes no precaution for his own safety at that point, is chargeable with contributory negligence, and has no claim upon the city for damages. A citizen has no right of action against a contractor for cleaning the streets, for injuries caused by the non-feasance of the contractor. The contractor owes no duty to the citizen. *Erskine vs. Philadelphia*, 16 Phila., 151.

XXVIII. NEGLECT TO CLOSE VACATED STREET. Where a city has vacated a street and failed to bar ingress by gate or fence, and by excavations has rendered it dangerous for travel, the city is liable in damages for an injury occasioned thereby. *Dougherty vs. Philadelphia*, 4 W. N., 287.

XXIX. NEGLECT TO GUARD EXCAVATIONS. 1. Where a lighting company, after the completion of a street main, removed barriers erected to protect the public from the danger of an open trench, resulting in a serious injury to the plaintiff while driving on a dark night, the question of damages was properly left to a jury. *Bloomsburg Steam Co. vs. Gardner*, 126 Pa., 80. 2. It is the duty of a municipality upon digging an excavation in the street and piling up the dirt therefrom, to place a light at or near said obstruction at night to prevent injury to travelers. *Kenyon vs. City*, 9 W. N., 222. 3. Where the roadway of a street terminated at a bridge, and a drunken man walked off the pavement on the side just before the sidewalk joined the bridge, held, to be contributory negligence.

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Linton vs. Chester Co., 1 W. N., 192. 4. When the city authorities, after ample notice of the existence of a dangerous hole in a street near a crossing, omit to cover it up or give warning to passers-by of the danger, a case of unmitigated negligence is presented. *Rogers vs. Philadelphia*, 17 Phila., 347. 5. The plaintiff's horse was injured by falling in the night-time into a trench extending across a street. Held, that inasmuch as no barriers were placed across the street so as to shut it from travel, it was a matter for the jury to determine, whether sufficient lights were placed to warn the public that the street was not passable, and whether the plaintiff was guilty of contributory negligence in driving into the trench. *Wood vs. Bridgeport*, 6 Montgomery Co., 101. 143 Pa., 167. 6. Contractors making excavations in the streets of a city must take proper precautions to prevent accidents. *Zehnder vs. Miller*, 6 Phila., 356.

XXX. NEGLECT TO NOTIFY PROPERTY OWNERS OF IMPROVEMENTS. On a *scire facias sur* municipal lien for damages for the grading of a street, the defendant may show that he had no notice of the proceedings, and hence no opportunity for making his defence before the viewers or in court. In such case the confirmation of the report of the viewers does not conclude him; he must make his defence on the *scire facias*. *Hershberger vs. Pittsburg*, 115 Pa., 78.

XXXI. NEGLECT TO PAY ASSESSMENT FOR PAVING. 1. Under the statute law, a lot owner on an avenue opposite a public common, is liable for the costs of grading and paving the whole of the street in front of his lot, and not the half of its width only. If the party has no opposite neighbor to share the tax with him, it is the price he pays for the privilege of an open common in his front. *McGonigle vs. Allegheny*, 44 Pa., 118. 2. An affidavit of defence to a municipal claim for street paving is sufficient to prevent judgment, which avers that the street is occupied by a railway company which, under the act of April 8, 1864, is required to pave, repave and repair any streets occupied by its tracks. *Philadelphia vs. Market Co.*, 154 Pa., 93.

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3. By act of January 6, 1864, authorizing the councils to pave the streets and collect the costs from property abutting thereon, the assessments shall be liens on the properties, and shall, if filed within six months after the completion of such improvements, continue liens for five years, and be revived by *scire facias*. If, on any sheriff's or other judicial sale, enough be not realized to pay off the lien, it shall remain a lien until paid in full. *Pittsburg's Appeal*, 70 Pa., 142.

XXXII. NEGLECT TO PROTECT. 1. It is negligence in a city to leave a dangerous place on a highway unguarded. The negligence of the city, however, will not dispense with the duty of the traveler to use ordinary care while traversing a highway. *Hill vs. Scranton*, 4 Luzerne Law Times, N. S., 105. 2. A precipice by the side of a narrow street requires fencing quite as much as the sides of a bridge. A horse is liable to fright, and those having charge of public highways should make reasonable provisions for a cause so common and likely to occur. *Pittston vs. Hart*, 1 Luzerne Law Times, 165. 3. It is the duty of a municipality to keep the approaches to dangerous places on its streets so guarded as to protect travelers. It must keep its streets in such order that even "skittish" horses may be employed without danger. Where, in a town a railroad ran parallel with the street, but about twelve feet below its level, it was the duty of the town authorities to have erected a proper barrier on the side of the street. Failing to do this, it was liable for an injury caused by a horse dragging a wagon and driver over the side. *Pittston Borough vs. Hart*, 89 Pa., 389. *Herr vs. Lebanon*, 149 Pa., 222.

XXXIII. NEGLECT TO RECORD PLANS. The direction to record plans for the opening of streets, is merely directory, and the omission so to record them is not a valid objection to the opening of a street laid down thereon. *Sower vs. Philadelphia*, 35 Pa., 231.

XXXIV. NEGLECT TO REMOVE NUISANCE. Ownership of property on a street gives the owner no right to restrain a

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nuisance in the street, except in the portion fronting his premises. The public authorities, however, can act. *Collins vs. Ry. Co.*, 32 W. N., 379.

XXXV. NEGLECT TO REMOVE OBSTRUCTIONS. 1. A, the owner of a sleigh, invited B to ride with him. In riding through a town after night, the sleigh was overturned by obstructions placed by the borough in the street, while it was being repaired. In a suit by B against the borough for damages, held, that even if A had been negligent in driving, B could recover against the town, as he was answerable for his own negligence alone. *Carlisle vs. Brisbane*, 2 *Lancaster Review*, 404. 113 Pa., 544. 2. An accumulation of ice, caused by the defective obstruction of a highway and the absence of drains, casts upon the municipality the duty of removing the obstruction upon notice. It is liable for injury caused to a person by slipping on the ice in a street, accumulated as the result of the neglect of the corporation to construct drains. *Decker vs. Scranton*, 151 Pa., 241. 3. A city is not responsible for damages resulting from obstructions to the highway, the danger from which is occult. In the present case, the front steps of an unoccupied house were temporarily enclosed with a paling fence, the gate of which was opened outwardly by some one on the step and struck and injured a passer-by. *Eisenbrey vs. Philadelphia*, 24 W. N., 231. 4. Where an injury occurs to a party through an obstruction in a public street, placed there by a contractor exercising an independent employment, a municipality is not liable unless, by the terms of its contract, the contractor is under its management. *Erie vs. Caulkins*, 85 Pa., 247. 5. A contractor owes no duty to a citizen for non-feasance, for which the citizen can maintain an action. One who knows of the dangerous condition of a street, and attempts to cross it without taking precautions, is guilty of contributory negligence, and cannot sustain an action against the city for damages. *Erskine vs. McNichol*, 13 W. N., 224. 6. Where it was shown that flagstones deposited in the street by a contractor were

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suffered to remain there for a week, resulting in an accident to the driver of a vehicle, it is a question for the jury whether there was any negligence on the part of the city. *Farley vs. Philadelphia*, 15 Phila., 290. 7. When the city or an individual temporarily uses a portion of the highway for a purpose which is not unlawful, the obstruction is not *per se* a nuisance. The only duty imposed upon the city in regard to the highways is to keep them ordinarily safe for travel, and in proper repair for that purpose. *Heidenwag vs. Philadelphia*, 15 Pa. County, 200. 8. An intoxicated man has no peculiar privileges, and if through his negligence he is injured on the streets of a city, the city is not liable. If the streets were safe and convenient for ordinary pedestrians, the law does not require them to be more so to accommodate the movements of a drunken man. *Linton vs. Chester*, 22 *Pittsburg Journal*, 196. 9. Where on the sidewalk a pole had been erected by citizens, and by lapse of time had become rotten and unsafe, it was the duty of the municipality to remove it. Failing to do so, the town was liable for injury resulting from its fall. *Norristown vs. Moyer*, 67 Pa., 356. 10. In this case, a horse was frightened at a barrel and truck of whitewash standing alongside of a road. He overturned the carriage and hurt the driver, who brought suit against the owners of the barrel. Held, that unless there was something unusual in the appearance of the whitewashing apparatus, which would naturally tend to frighten horses of ordinary gentleness and training, it was not negligence to use it, or to allow it to remain for a brief period along the highway, even though some horses might take fright at seeing it. *Piolett vs. Simmons*, 1 *Lancaster Review*, 462. 11. Where, owing to a lowering of the grade of a street, a water plug protruded above the surface, which fact was known to the city authorities, who neglected to remove or lower it, resulting in injury to a party driving against it, the city was held liable in damages, notwithstanding the obstruction was originally placed in the street by an incorporated water company. It was an inexcusable neglect for the city, when lowering the grade of

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the street, to allow this obstruction to remain. *Scranton vs. Catterson*, 94 Pa., 202. 12. Certain gutter-stones had been left so as to project upward and over the curb. They had been in this condition for two months. The plaintiff, a child of seven years, tripped over these stones on her way to school, and was seriously injured. There was no evidence of contributory negligence. Held, that the length of time that the stones had remained affected the city with notice of the existence of the nuisance, and it was liable in damages. *Symons vs. Philadelphia*, 19 Phila., 417. 13. Where for several winters boys had used the streets of a borough for coasting, and on one occasion a pedestrian was struck by a sled on such street and injured, it was held, that the borough was not liable in an action for damages. *Stevenson vs. Phoenixville*, 1 Chester Co., 113. 14. Where a large stump was removed from a sidewalk and rolled into the street, and permitted to lie there for two weeks, without a light to warn travelers at night of its position, and a person is injured thereby, the borough is liable in damages. *Trego vs. Honeybrook*, 160 Pa., 76.

XXXVI. NEGLECT TO REMOVE SNOW. 1. A city may be held liable for an injury to a party resulting from driving into a bank of snow and ice which for a long period had been allowed to remain on the side of a street. *Carr vs. Easton City*, 142 Pa., 139. 2. A municipality is not liable for injury caused by the slippery condition of its streets alone, but it is liable where the injury is caused by the accumulation of ice or snow forming dangerous ridges. *Mauch Chunk vs. Kline*, 100 Pa., 119. 4. Luzerne Law Times, N. S., 189. 3. A town is liable for damages for injuries for neglect in permitting a dangerous obstruction, like ridges of snow and ice, to remain for a long period on a public sidewalk. In such cases the town is chargeable with constructive notice of the obstruction. *McLaughlin vs. Corry*, 77 Pa., 109.

XXXVII. NEGLECT TO REPAIR. 1. The authorities of a borough are bound to keep its streets in repair. They may be compelled to do so by mandamus. *Borough of Uniontown*

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vs. *Comm.*, 34 Pa., 293. 2. The question of a municipality's negligence should be submitted to a jury, where there is evidence that stones at a street crossing, at which plaintiff was injured, were in a slanting position, and projecting one above another, and had been permitted to remain so for several months prior to the accident. *Chilton vs. Carbondale*, 160 Pa., 463. 3. An indictment will lie against the officers of a city for neglecting to keep streets in a safe and passable condition, whenever the duty to keep them in repair is enjoined on them by statute. *Comm. vs. Jones*, 5 Pa. County, 63. 5 C. P. Reporter, 41. 4. A corporation, which is bound by its charter to keep its streets in repair, is liable for an injury occasioned by its neglect to do so, and it is not material whether the neglect was wilful or otherwise. Culpable negligence or want of ordinary care on the part of the plaintiff would be a defence, the burden of proof being on the corporation. In the present case, a carriage was upset by the *debris* of a broken bridge. *Erie City vs. Schwingle*, 22 Pa., 385. 5. A municipality is bound to keep the streets in repair. It should remove all obstructions thereon which impede travel or make it dangerous. Where the carcass of a horse remained on a city street for twenty-four hours, resulting in frightening a horse and injuring its rider, held, that the question whether the city was negligent in not removing the nuisance was for the jury. *Fritsch vs. Allegheny*, 91 Pa., 226. 6. The original paving of a street is a local improvement, and is within the principle of assessing the cost upon the lots lying upon it. But repairing streets is part of the duty of a municipality for the general good. Hence, when a new pavement is selected for a thoroughfare, to be substituted in place of one previously laid, the municipality and not the adjacent property owners should pay for it. *Hammett vs. Philadelphia*, 65 Pa., 146. 7. The duty imposed upon a municipality in regard to its highways, is to keep them ordinarily safe for travel, and in proper repair for that purpose. This duty relates only to construction and repairs. When the city or an individual tem-

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porarily uses a portion of the highway for a purpose that is not unlawful, the obstruction is not *per se* a nuisance. *Hardenwag vs. Philadelphia*, 3 Pa. Dist., 292. 8. Municipal corporations are responsible for the negligence of their officers in the repair of their highways. This repair is a mandatory and absolute duty. *McDade vs. Chester City*, 117 Pa., 414. 9. The city of Philadelphia and the passenger railway companies are both liable in damages for neglect to repair the streets on which the railway tracks are laid. *Philadelphia vs. Weller*, Leg. Gaz. Report, 400. 4 *Brewster*, 24. 10. A borough is liable for injuries occasioned by the negligence of its corporate authorities in not keeping the highways in repair or free from obstruction. *Stevenson vs. Phoenixville*, 1 Chester Co., 113.

Street Cars. See "RAILWAYS."

Strikes.

I. NEGLECT IN ORGANIZING. An organization of working men formed to secure the payment of higher wages is not an unlawful one. When by words and acts, their numbers, their manner, their movements by annoyance and intimidation, the members undertake to compel other workmen to cease work, they may be enjoined. *McCandless vs. O'Brien*, 38 Pittsburg Journal, 435.

II. NEGLECT TO PRESERVE ORDER. 1. It is an indefeasible right of a mechanic or laborer to fix such value on his services as he sees proper, and to refuse to work for a less sum. But where by force or menace a labor organization prevents others from working, it is guilty of a conspiracy. *Cote vs. Murphy*, 159 Pa., 425. *Buchanan vs. Kerr*, *Idem*, 433. 2. When, by words and acts, by annoyance and intimidation, the members of a labor organization try to compel men to cease work, they are guilty of wrongful acts and may be enjoined. *McCandless vs. Kintzer*, 8 Lancaster Review, 254. *Comm. vs. Redshaw*, *Idem*, 71. 3. A preliminary injunction will be

Strikes—Continued.

awarded, where it appears that the defendants, striking employees of plaintiff, refused to permit other persons to work for him and addressed threats and opprobrious epithets to plaintiff's officers and workmen, gathering in crowds at plaintiff's place of business, and the boarding-houses of the workmen, following them to and from their work, stopping them on the highway and holding them up to ridicule and contempt.

Wick China Co. vs. Brown, 164 Pa., 449.

III. NEGLECT TO RESTRAIN. A court of equity will restrain, by injunction, discharged employees, members of a union, from interfering with workmen employed in their places. *Murdock vs. Walker*, 152 Pa., 595.

Submission.

I. NEGLECT IN MAKING. The submission of a cause, under the provisions of the act of May 14, 1874, to a person learned in the law, must be to one who is authorized to act as an attorney in the supreme court of this state. *Campbell vs. Fayette Co.*, 127 Pa., 86.

II. NEGLECT TO CERTIFY THE EVIDENCE. When a case was submitted to the president judge by agreement upon the depositions and admitted facts, which on writ of error were not certified, the court of error will not take notice of them. *Hughes vs. Peaslee*, 50 Pa., 257.

Subpœnas.

NEGLECT IN CHARGE FOR SERVING. A party to a suit who serves his subpœnas in person, is not entitled to any compensation or mileage for so doing. *Bonnell vs. Lance*, 18 Phila., 307.

Subrogation.

I. NEGLECT TO ALLOW. 1. Subrogation is of pure equity and benevolence, not of contract. One attempting to defraud another by payment, cannot ask repayment from the party attempted to be defrauded. A chancellor will not assist one

Subrogation—Continued.

to obtain anything arising out of a fraud. He who does inequity shall not have equity. *Bleakley's Appeal*, 66 Pa., 187. 2. Subrogation is a right arising in pure equity. To entitle a party to subrogation, his equity must be strong and his case clear. Until the creditor has been fully paid, substitution or subrogation cannot take place. *Forest Oil Co.'s Appeal*, 118 Pa., 145. 3. The court should see to it that the subrogation will work no injustice to the rights of others. *Knouf's Appeal*, 91 Pa., 78. *Budd vs. Oliver*, 148 Pa., 194. 4. Where the right of subrogation or contribution is not clear, the court will not apply the summary remedy of the act. *Wilson vs. Ritchie*, 4 W. N., 37.

II. NEGLECT TO ASSERT CLAIM. 1. It is a settled principle that the holder of an equity must be vigilant in asserting it, if he would have the aid of a chancellor. Laches in such a holder will always postpone him to one who may have been injured by his inertness. *Douglass' Appeal*, 48 Pa., 225. 2. The right to subrogation is one of equity merely, and due diligence must be exercised in asserting it. Laches in taking advantage of the right will forfeit it as against one who is injured by such laches. *Gring's Appeal*, 89 Pa., 336. 3. The right of subrogation is one merely in equity, and due diligence must be exercised in ascertaining it. *Packer vs. Vandervender*, 10 Lancaster Review, 149.

Subscriptions.

NEGLECT TO PAY. 1. Subscriptions to an object are not enforceable while the project remains uncertain. *Baira's Estate*, 7 W. N., 439. 2. The subscribers to a fund for the erection of an academy by such act agree to organize for the purpose contemplated. Each subscription is a contract by each associate with his fellows, in consideration of similar contracts by them, to contribute to the common fund the amount subscribed. *Edinboro Academy vs. Robinson*, 37 Pa., 210. 3. Subscriptions made before a company is organized must be unconditional. But after the organization the company may stipu-

Subscriptions—Continued.

late with subscribers that they may pay in any manner mutually agreed upon ; and it can enforce a subscription only according to its conditions. *Pittsburg R. R. vs. Stewart*, 41 Pa., 55. 4. A subscription towards the erection of a church made without consideration, and where it does not appear that others were induced to subscribe, or that any work was done on the faith of it, is rendered void by the death of the promisor within one month thereafter. *Reimensnyder vs. Gans*, 110 Pa., 216. 5. A verbal promise to pay a certain sum to reduce the debt of a church on condition that the whole amount be raised, is not binding unless this condition has been performed. *Stuart vs. Presbyterian Ch.*, 84 Pa., 388.

Summary Conviction.

NEGLECT IN THE RECORD OF THE JUSTICE. 1. In a summary conviction, the magistrate is bound to set forth the evidence at length in his record. *Comm. vs. Cane*, 2 Parsons, 269. 2. To sustain a summary conviction by a justice of the peace, the essential parts or particular substance of the whole testimony must be set forth. A summary conviction for fishing with a seine-net will be set aside, where the record of the justice sufficiently sets forth the testimony of one witness, but there is nothing to show to what the other witnesses examined deposed. *Comm. vs. Thomas Crader*, 17 Pa. County, 4. 3. A justice's record in a summary conviction should show that the magistrate had jurisdiction both of the subject-matter and the place where the offence was committed ; should specify the law that has been violated, and, if the penalty is to be paid to any person, the suit should be instituted by such person. *Comm. vs. Flinchbaugh*, 1 York Record, 1. 4. The record in a case of summary conviction by a justice of the peace for violation of a penal law, must contain within itself a statement of guilt of the defendant with sufficient clearness to show jurisdiction both of the person and the subject-matter. The evidence, either at length or in substance, must be returned. *Comm. vs. Kinter*, 5 C. P. Reporter, 3. 5. In proceedings for

Summary Conviction—Continued.

summary conviction, the record must contain the evidence or its substance. *Comm. vs. Patton*, 4 Pa. County, 135. 6. In cases of summary conviction, it is the duty of magistrates to send up every part of the record, including complaint, warrant and all the relevant acts of the justice and parties, and a full record of the proceedings. *Comm. vs. Schall*, 5 York Record, 187. 7. The record of a summary conviction must contain an information or charge against the defendant; a summons or notice, or a warrant; the defendant's confession or defence; the evidence, and the judgment or adjudication. All this must be particularly stated. *Laverty vs. Comm.*, 35 Pittsburg Journal, 70.

Sunday.

I. NEGLECT IN PUBLISHING LEGAL NOTICES. Publication of the mercantile appraiser's list, in a newspaper dated and distributed on Sunday is not a legal publication of such list (Opinion of Deputy Attorney General.) *Mercantile Appraiser's List, In re*, 2 Chester Co., 490.

II. NEGLECT TO OBSERVE. 1. A sale of cigars on Sunday by a licensed innkeeper, whether to his guests or to strangers, is illegal, under the act of April 22, 1794. The sale of ice cream on Sunday, by a baker who does not furnish ordinary public entertainment, is a worldly employment prohibited by the statute. *Baker vs. Cornin*, 5 Pa. County, 10. *Comm. vs. Burry, Idem*, 481. 2. A judgment will not be stricken off because the warrant of attorney was dated on a Sunday. The courts will not, on such a ground, interfere with an executed contract. *Baker vs. Lukens*, 35 Pa., 146. 3. Under the act of 1794, a contract made on Sunday for the hire of horses to be used for pleasure is void, and the hirer cannot recover. Under the same act, a contract made on Saturday for the hire of horses to be used on an excursion of pleasure on Sunday is void. *Berrill vs. Smith*, 2 Miles, 402. 4. Contracts merely secular, made on Sunday, to take effect from the moment they are concluded, are void. An instrument which does not take

Sunday—Continued.

effect until delivery is not void because signed on Sunday. Making a will is not within the prohibition of the act of April, 22, 1794. Unlike the making of contracts, it is a solemn matter, performed without the slightest desecration of the Sabbath. *Beitenman's Will*, 55 Pa., 183. 5. A baker who keeps his store open for business, and sells ice cream and cakes on Sunday, is violating the act of April 22, 1794. *Burry's Appeal*, 1 **Monaghan**, 89. 6. All contracts made on Sunday are considered as not made at all. If the last day for giving a notice falls on Sunday, a notice given on that day is to be considered as received on Monday. An agreement, though made on Sunday, and void as an executory contract, binds the parties, where the money was paid afterwards, the receipt for the same constituting a new contract, which was binding on the parties. Notice of protest of a note left with the endorser on Sunday, with information of its contents, is valid where the notice could have been served on Monday. *Carlisle Bank vs. Rheem*, 10 Phila., 462. 7. An executed contract is not void although made on Sunday. The Sunday law of 1705 does not declare a contract made on that day void, but the law will not enforce an executory contract so made. *Chesnut vs. Harbaugh*, 78 Pa., 473. 8. A regularly licensed innkeeper has a right to sell ice cream in his parlors on Sunday, without rendering himself liable to the penalties of the act of 1794. *Comm. vs. Bosch*, 1 **Lancaster Review**, 412. 9. The act of May 13, 1887, restraining and regulating the sale of liquors, does not prohibit the use of liquors by a private citizen on his own table on Sunday for his family or guests. *Comm. vs. Carey*, 151 Pa., 368. 10. No criminal warrant may be issued on Sunday, except upon a charge of felony, or for an actual breach of the peace, or conduct which would probably cause such breach. *Comm. vs. De Puyter*, 16 Pa. County, 589. 11. It seems that the unnecessary performance of secular labor on Sunday, in such a way as to disturb the religious worship of others, is indictable in Pennsylvania. Parties are guilty of riot who attend church with the intent to laugh and talk during the services, and resist

Sunday—*Continued.*

by force any effort to eject them. *Comm. vs. Dupuy*, Brightly's Rep., 44. 4 Clark, 1. 12. A will made on Sunday, while the testator was, or believed he was, in immediate danger of death, is valid. *Weidman vs. Marsh*, 4 Clark, 401. 13. The sale of railroad tickets on Sunday, to be used by the purchasers in attending camp-meeting, is a work of necessity. *Comm. vs. Fuller*, 4 Pa. County, 429. *Comm. vs. Weidner, Idem*, 437. 14. Charging and receiving compulsory prices for admission to a camp-meeting on Sunday, where religious services are being held, amounts to worldly employment or business, and the person so exacting fees is liable under the act of April 22, 1794. *Comm. vs. Weidner*, 20 Phila., 404. 15. The term "works of necessity" in the act of 1794, commonly called the Sunday law, does not mean works of absolute necessity. The act simply prescribes a day of rest from motives of public policy. The pumping of oil wells on Sunday, it appearing that, if they are not pumped, loss results to the owners by reason of salt water getting into the wells, is a work of necessity within the act. *Comm. vs. Gillespie*, 38 Pittsburgh Journal, 213. 16. One who is a stockholder and manager of a corporation engaged in publishing a newspaper on Sunday is liable to conviction for performing worldly employment on that day, although he may not have personally been at the office or done any work connected with the newspaper on Sunday. *Comm. vs. Houston*, 3 Pa. Dist., 686. 17. The business of a barber in shaving his customers on Sunday morning, is worldly employment, prohibited by the act of 1794. Closing a public library on Sunday is in entire harmony with that law. *Comm. vs. Jacobus*, 17 Pittsburgh Journal, 154. Leg. Gaz. Report, 491. *Granger vs. Grubb*, 7 Phila., 350. *Comm. vs. Waldman*, 8 Pa. County, 449. 140 Pa., 89. *Comm. vs. Williams*, 1 Pearson, 61. *Stout's Case*, 2 Schuylkill Record, 311. 18. The running of cars on passenger roads on Sunday is a disturbance of the public peace, and the rights of worship and of rest; and the drivers of such cars may be arrested for a breach of the peace. *Comm. vs. Jeandell*, 2 Grant, 506.

Sunday—Continued.

19. A bond is not perfected until delivery; hence a mere signing on Sunday does not render it void, if not delivered until the day following. *Comm. vs. Kendig*, 2 Pa., 448.

20. The sale of milk on Sunday, as a business, is within the prohibition of the act of 1794. Delivery of milk is allowed under the act. *Comm. vs. Martin*, 37 Pittsburg Journal, 92.

21. Selling Sunday newspapers on Sunday and delivering them to customers is worldly employment prohibited by the act of April 22, 1794. Sunday newspapers are a convenience, not a necessity. *Comm. vs. Matthews*, 152 Pa., 166. 2 Pa. District, 13. 5 York Record, 191.

22. Base-ball playing on Sunday, at an unfrequented place, is not such a breach of the peace as to make the parties playing indictable for a common nuisance, in the absence of evidence that a neighbor was disturbed by any disorder on the part of spectators or participants in the game. *Comm. vs. Meyers*, 8 Pa. County, 435. *Comm. vs. Parks*, 6 Montgomery Co., 141.

23. The term "worldly employment," in the act of 1794, was not intended to include such household work as pertains directly to the proper duties, necessities and comforts of the day. *Comm. vs. Nesbit*, 34 Pa., 398.

24. An innkeeper cannot legally sell liquor to a sojourner on Sunday. *Comm. vs. Omit*, 1 Pittsburg Journal, 87. 21 Pa., 426.

25. The operating a steamboat on a navigable river on Sunday for the purpose of conveying excursions, is worldly employment prohibited by the act of April 22, 1794. The act, however, permits ferrymen to transport passengers on Sunday. *Comm. vs. Rees*, 39 Pittsburg Journal, 189. 10 Pa. County, 545.

26. Mail trains and trains carrying perishable freight and church trains are necessary within the meaning of the act. The burden of proof, where worldly employment is admitted, is upon the defendant to show that it was a work of necessity. *Comm. vs. Robb*, 3 Pa. Dist., 701.

27. The sale of soda water by a druggist on Sunday is a violation of the act of 1794. But the sale of it by the keeper of a restaurant in connection with meals furnished, is not illegal. It makes

Sunday—Continued.

no difference how many acts of worldly employment may be done on the same Sunday, they constitute but a single violation of the law, and can be the subject of but one fine. *Comm. vs. Ryan*, 3 Lackawanna Jurist, 334. *Comm. vs. Hengler, Idem*, 333. *Comm. vs. Moses, Idem*, 335. *Splane vs. Comm.*, 35 Pittsburg Journal, 102. 28. The sale of liquor on Sunday is punishable by fine and imprisonment, and the court has no discretion to remit the latter. *Comm. vs. Shade*, 1 Woodward's Decisions, 44. 29. The mere carrying about and selling newspapers on Sunday does not amount to a breach of the peace, but the crying of newspapers in the streets on that day is a breach. *Comm. vs. Teaman*, 1 Phila., 462. 30. Jews and others, who keep the seventh day as their Sabbath, are not absolved from their duty under the law to observe the first day of the week, by abstaining from worldly business. *Comm. vs. Wolf*, 3 S. & R., 48. *Society vs. Comm.*, 52 Pa., 125. 31. The act of April 22, 1794, permits food dressed in an inn to be sold therein to other than sojourners, travelers or strangers. He may keep an ice cream parlor open on that day. *Comm. vs. Woods*, 15 W. N., 316. 32. A subscription made on Sunday towards the erection of a church is binding. The owner of a store who permits his clerk to sell for him on Sunday, as well as the clerk, is liable to the penalty imposed by the act of 1794. *Dale vs. Knapp*, 29 Pittsburg Journal, 75. *Seaman vs. Comm., Idem*, 95. 33. An agreement to subscribe towards the erection of a church edifice is a work of charity within the meaning of the act of April 22, 1794, and may, therefore, be enforced though made on Sunday. A contract made on Sunday is not void at common law. Even under the above act, a will executed on Sunday is not void, although the testator at the time be in apparent good health. It is held, that the hire of a carriage on a Sunday by a son to visit his father created a legal contract. *Dale vs. Knapp*, 98 Pa., 392. *Logan vs. Matthews*, 6 Pa., 417. 4. It seems that, under the act of 1774, a person may be convicted for every violation

Sunday—Continued.

of the Sabbath committed by him, even though occurring the same day, unless it be in one continuous transaction. He who buys, as well as he who sells, may be convicted. *Duncan vs. Comm.*, 2 Pearson, 213. 35. There can be but one violation by the same person on the same day of the act of April 22, 1794, called the "Sunday Act," and consequently there can be but one fine imposed for that violation. *Friedeborne vs. Comm.*, 113 Pa., 242. 2. **Montgomery Co.**, 149. 3 **Lancaster Review**, 398. 36. While courts will not undo a bargain made on Sunday if the parties have fully executed it, yet the law will not lend its aid to either party to enforce such a bargain. Such contract is worldly employment upon the Lord's day in violation of the divine law, and of the statute of 1794, and is void. *Foreman vs. Ahl*, 55 Pa., 325. 37. A bond executed on Sunday is not void by common law, but by statute, and the fact must be specially pleaded. It cannot be taken advantage of under a plea of *non est factum*. *Fox vs. Mensch*, 3 W. & S., 444. 38. In this case, argued in 1850, the supreme court was equally divided on the question, as to whether a marriage contract was legal, if executed on Sunday. *Gangwere's Estate*, 14 Pa., 429. 39. In an action on a contract of sale of a chattel, proof that it was received from a third person on Sunday does not raise a presumption that the contract was made on that day. *Hadley vs. Snevily*, 1 W. & S., 477. 40. No office belonging to our judicial tribunals is open on the Sabbath. Sunday is not a judicial day; therefore, when the last day given by an act of assembly for an appeal happens on Sunday, the party has the next day to attend to that duty. It is not like a note due in bank, which is to be protested on Saturday, when the last day of grace falls on Sunday; that is regulated by the custom of merchants, which is universal. *Harker vs. Addis*, 4 Pa., 515. 41. A judgment is not erroneous because the verdict on which it was rendered was delivered on Sunday. *Huidekoper vs. Cotton*, 3 W., 56. 42. Though traveling does not in a legal sense fall within the

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description of worldly employment prohibited by the act of 1794, yet the running of public conveyances on Sunday is forbidden. *Johnson vs. Comm.*, 22 Pa., 102. *Comm vs. Jeandell*, 2 Grant, 506. 43. However improper the act, the delivery of *præcipes* for execution to the prothonotary at his residence on Sunday did not impair the validity of executions issued the next morning. The prothonotary was not bound to receive the papers at his residence, and his acceptance of them was not an official act, but merely as agent of the party leaving them. A judgment is not invalid, because the warrant of attorney on which it was confessed appears to have been dated on Sunday. *Kauffman's Appeal*, 70 Pa., 263. 44. A note given on Sunday is void, and there can be no recovery upon it. *Kepner vs. Keefer*, 6 W., 231. 45. Where a note given on Sunday contains a confession of judgment, the court will not open the judgment because confessed on that day, the confession being treated as a thing, not a contract. In a suit upon a contract made on Sunday, the defendant may show that fact, if the plaintiff's case fails to disclose it. It seems, that this defence need not be specially pleaded. *Lee vs. Drake*, 10 Pa. County, 276. 46. A bond executed and delivered on Sunday is void as a contract, but it may be used as an admission of liability. A man may acknowledge the truth on Sunday, and this admission may be given in evidence against him. So, if he writes a letter on Sunday. *Lea vs. Hopkins*, 7 Pa., 492. 47. An executory contract made on Sunday cannot be enforced. *Linden vs. Hicks*, 5 Legal Opinion, 24. *Morgan vs. Richards*, 1 Browne, 171. 48. A promissory note, signed on Sunday, but not delivered until the next day, is valid. *McCauley vs. Phipps*, 1 Chester Co., 495. 49. It is unlawful for a barber to shave his customers on Sunday, under the act of April 22, 1794, but it is lawful to sell ice cream and to cook and provide victuals. *Paizer vs. Comm.*, 4 Kulp, 286. *Comm. vs. Bosch, Idem*, 203. 50. The act of 1861, requiring saloons to be kept closed on Sunday, is violated if a saloon is allowed to be open, whether for the sale of liquor, for cleaning up, or for any other

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business purpose, and the question of the proprietor's intent is immaterial. *People vs. Waldogle*, 2 Kulp, 216.

51. Under the act of April 22, 1794, prohibiting worldly employment on Sunday, a person may be convicted of each separate offence and fined for each, although the offences were committed on the same Sunday. *Reiff vs. Comm.*, 18 Phila., 641. 14 Luzerne Register, 79. 3 Kulp, 253. But see *Friedeborn vs. Comm.*, 113 Pa., 242.

52. The service on Sunday upon an endorser of the notice of the dishonor of a note was unlawful, and the endorser is not bound thereby. Receiving the notice on Sunday in silence was not a waiver of the irregularity. *Rheem vs. Carlisle Bank*, 76 Pa., 132.

53. A release of mechanics' liens signed on Sunday is binding, the contract being executed and not executory. A manager, director and stockholder of a corporation which publishes a newspaper on Sunday, though never at the office on Sunday nor doing any work on that day, is liable to conviction for worldly employment on Sunday. *Steyert's Estate*, 5 Delaware Co., 470. 10 Montgomery Co., 75. *Comm. vs. Houston*, *Idem*, 82. 54. Under the act of April 22, 1894, upon information given, a penalty may be imposed upon any one found guilty of engaging in any worldly employment or business. *Seaman vs. Comm.*, 11 W. N., 14. 55. The fact that a contract is signed on Sunday does not avoid it, unless it be delivered on Sunday. *Sherman vs. Roberts*, 1 Grant, 261.

56. Contracts made on Sunday are not void at common law. The Pennsylvania act of 1794 interdicts every kind of worldly employment on Sunday, and inflicts a penalty, but does not expressly annul or avoid the act done. An executory contract made on Sunday is void, but an executed contract will not be avoided on that ground. Hence, a deed previously signed and acknowledged, but delivered on Sunday, will pass title. *Shuman vs. Shuman*, 27 Pa., 90. 57. Running passenger cars on Sunday is a violation of the act of 1794, and is within its penalties, but a private party cannot vindicate the rights of others by process in his own name, nor employ civil

Sunday—Continued.

process to punish wrongs to the public. Individuals can invoke the chancery powers of the courts only for the redress of private injuries done or threatened. *Sparhawk vs. Union Railway*, 54 Pa., 401. 58. Under the act of 1794, prohibiting any worldly employment on the Lord's day, members of a society or sect who conscientiously observe the seventh day of the week as the Sabbath, are amenable for performing worldly labor on the first day. *Specht vs. Comm.*, 8 Pa., 312. 59. A bond is not perfected until delivery; hence, a mere signing on Sunday does not render it void, if not delivered until the following day. So as to all instruments which do not take effect until delivery. *Stevens vs. Hallock*, 7 Kulp, 260. *Bear vs. Trexler*, 3 W. N., 214. *Wiley vs. Wildermuth*, 4 W. N., 560. 60. Judicial business on Sunday, in civil cases is a violation of the rule of the common law and our statutes. A direction given on Sunday to a sheriff to proceed with an execution, is a nullity. *Stern's Appeal*, 64 Pa., 447. 61. One who is pursuing worldly business on Sunday, by running a boat on a stream, may, nevertheless, recover damages for an injury on that day by an obstruction in the river. *Strickler vs. Hough*, 3 **Pittsburg Journal**, 93. *Mohney vs. Cook*, 4 *Idem*, 460. 62. The constitutionality of the Sunday act of April 22, 1894, has been finally settled, and seventh-day Baptists are equally amenable to its provisions as other citizens. *Waldo vs. Comm.*, 9 W. N., 200. 63. An agreement made on Sunday is void as an executory agreement, but by the payment of the money afterwards, and its receipt by the obligee, a new and binding contract exists. *Uhler vs. Applegate*, 26 S., 140.

Supreme Court.

I. NEGLECT TO BRING UP RECORD. The regular method of bringing up the record from the court below, is by *certiorari*, and nothing else can stay the proceedings of the lower court. *Walker's Appeal*, 2 D., 190.

II. NEGLECT TO GIVE WRITTEN OPINIONS. Under the act of May 11, 1871, the supreme court will reduce their opinions

Supreme Court—Continued.

to writing only in cases of reversal, and in such cases of affirmance as shall be deemed by a majority of the court sufficiently important. When a judgment is pronounced "*per curiam*," it will imply that elucidation and argument are not required in that case. *Letskus vs. Butler*, 69 Pa., 277.

III. NEGLIGENCE TO TAKE EXCEPTIONS. In reviewing the proceedings of subordinate tribunals, whether civil or criminal, the supreme court is confined to adjudication upon the errors of law upon the record, and cannot look beyond them. The opinion of the court below on a motion for a new trial is not part of the record; nor can the record be amended by a fact stated therein. The refusal of the court below to grant a new trial is not assignable as error. *Cathcart vs. Comm.*, 37 Pa., 108.

Surety.

I. NEGLIGENCE BY ALTERATION OF CONTRACT. Any material variation of a contract with the principal, without the consent of the surety, discharges the surety. *Crompton's Estate*, 20 Phila., 64.

II. NEGLIGENCE BY GIVING TIME TO PRINCIPAL. 1. Where a creditor gives time to his principal debtor, taking a judgment note in consideration therefor, he discharges the surety. *Blank vs. Weber*, 2 Walker, 205. 2. Nothing short of an agreement to give time, which binds the creditor and prevents him bringing suit, will discharge a surety. *Brubaker vs. Okeson*, 1 Luzerne Law Times, 83. 3. If creditors, after judgment, give time to the principal, the surety is discharged. An agreement between the principal and the creditor to submit to arbitration will not discharge the surety. The surety will be discharged whenever he cannot secure himself by discharging the claim of the principal and proceeding against the creditor. *Boschert vs. Brown*, 72 Pa., 372. 4. A mere agreement to give time in consideration of the payment of usury after the maturity of the note, would not be a valid consideration such as would discharge the surety. *Calvert vs. Good*, 95 Pa., 65. 5. If a

Surety--Continued.

creditor, by a subsequent valid contract, give time to the principal, the guarantor will be discharged thereby. *Campbell vs. Baker*, 46 Pa., 243. 6. To discharge a surety by reason of an extension of the time for payment of a debt granted to the principal, there must be a sufficient consideration for the contract, and the time of the extension must be definitely fixed. An agreement to delay for an uncertain period will not discharge him. *Case vs. Fuller*, 4 Kulp, 433. 7. If a creditor, by any contract which can be enforced in law or in equity, gives time to his debtor, he discharges the surety. Every surety has the right to come into a court of equity, and require to be permitted to sue in the name of the creditor. *Clippinger vs. Creps*, 2 W., 45. 8. The payment of interest upon an overdue note from the date of its maturity to a date in the future by the maker to the payee, if made and agreed to without the knowledge and assent of a surety on the note will discharge the surety. *Grayson's Appeal*, 108 Pa., 581. 9. A mere indulgence to a principal, until he becomes insolvent, will not release a security in a note, without omission by the plaintiff to proceed after notice. *Johnston vs. Thompson*, 4 W., 446. 10. Where a principal debtor, without the knowledge of the surety, for a consideration, agreed to extend the time of payment for a definite time, the surety is discharged. *Miller vs. Dishinger*, 27 Pittsburg Journal, 138. *Melich vs. Fortner*, 2 Luzerne Register, 239. *Henderson vs. Ardery*, 36 Pa., 449. *Brubaker vs. Okeson*, *Idem*, 519. *Comm. vs. Shryock*, 15 S. & R., 70. *Van Horne vs. Dick*, 151 Pa., 341. 11. If a creditor make an express agreement with the principal, upon sufficient consideration, or on taking a new security, to give a further time for payment, the surety is thereby discharged. But mere consent to forbear, for an uncertain period, does not tie up the creditor's hands, and an agreement without a sufficient consideration is *nudum pactum*. *Miller vs. Stein*, 2 Pa., 288. 12. A mere gratuitous indulgence of the principal does not release the surety. There must be such consideration for the promise of indulgence, as will make it bind-

Surety—Continued.

ing upon the obligee to have that effect. *Rhodes vs. Frederick*, 8 **W.**, 448. *Patterson vs. Grier*, 1 **Pittsburg**, 139. 13. A mere indulgence of the principal on a note without prejudice to the surety, does not discharge the surety. *Scott vs. Pierce*, 26 **Pittsburg Journal**, 119. 14. The rule is well settled, that mere forbearance by the creditor to the principal debtor, however prejudicial it may be to the surety, will not have the effect of discharging him from his liability. It is his business to judge of the danger of delay and quicken the creditor, in default of which the loss incurred is attributed to his supineness. *United States vs. Simpson*, 3 **P. & W.**, 439. *Mundorff vs. Singer*, 5 **W.**, 172. *Pittsburg & Fort Wayne R. R., vs. Shaeffer*, 59 **Pa.**, 356. 15. Mere forbearance, however prejudicial to a surety, will not discharge him. The failure of a creditor to revive a judgment does not discharge a surety, unless there was an express agreement at the time of giving the judgment that it should be revived for the benefit of the surety. *Winton vs. Little*, 94 **Pa.**, 64.

III. NEGLECT, BY RELEASE OF PRINCIPAL. 1. If the assignee of a joint bond by two persons, one the principal debtor and the other his surety, upon which he has judgment entered, release from its lien real estate of the principal, sufficient to pay the judgment, he discharges the surety. *Holt vs. Bodey*, 18 **Pa.**, 207. *Neff's Appeal*, 9 **W. & S.**, 36. 2. If a holder of a bond against two, with a surety for both, discharges one of the obligors, he releases, thereby, the surety, because he changes the contract of the surety without his consent. The duty to be performed was joint. The case is different where a bond is filed by two joint guardians in the orphans' court. The discharge of one of them by the court does not release the surety on their official bond. *Hocker vs. Woods*, 33 **Pa.**, 466. 3. If the holder of an obligation against two, with a surety for both, releases one of the obligors, he thereby, for obvious reasons, discharges the surety, but if a person becomes surety for two administrators or guardians, and one of them is discharged by court, without the knowledge or consent of the

Surety—Continued.

surety, his liability for the official acts of the remaining party continues. *Jamieson vs. Capron*, 95, Pa., 20. 4. If the holder of a note release the maker from liability therefor, he by such act exonerates the endorser from liability also. *McFadden vs. Parkes*, 4 D., 275. 5. The law is well settled that, if a creditor discharges a principal debtor, or in any considerable degree lessens his responsibility, without consulting the surety, the surety is discharged. *Palethorpe vs. Leshner*, 5 R., 274. 6. The principles which discharge a surety where time has been given to the original debtor, apply with equal if not greater force to a case where the creditor, without the consent of the surety, releases the principal by accepting a composition in discharge of his debt. *Wharten vs. Duncan*, 83 Pa., 43.

IV. NEGLIGENCE BY RELEASE OF SECURITIES. 1. A creditor, who releases any security which he holds for the payment of his debt, thereby releases a surety, *pro tanto*. *Neff's Appeal*, 9 W. & S., 36. *Cathcart's Appeal*, 13 Pa., 420. 2. The release of real estate belonging to the principal debtor, is a release of the surety. *Simkins vs. Jordan*, 6 W. N., 68.

V. NEGLIGENCE OF ADMINISTRATOR. 1. The presumption of payment of an administration bond does not begin to run from its date, but from the time when the plaintiff was entitled to resort to it. *Backestoss vs. Comm.*, 8 W., 286. *Comm. vs. Patterson*, *Idem*, 515. 2. The administrator and his original sureties are not liable on the administration bond for the proceeds of real estate sold by order of the orphans' court. *Beale vs. Comm.*, 17 S. & R., 392. *McCoy vs. Scott*, 2 R., 222. *Sawyer vs. Hicks*, 6 W., 76. 3. Any equitable defence for the sureties in an administration bond, founded on the negligence of parties in not citing the administrators, is proper in a *scire facias*, after judgment for the penalty, but not in a suit on the bond itself. *Carl vs. Comm.*, 9 S. & R., 63. 4. The sureties in an ordinary administration bond are not liable for the proceeds of the intestate's real estate, though charged in the administrator's account filed and settled. *Comm. vs. Gilson*, 8 W., 214.

Surety—Continued.

Reed vs. Comm., 11 S. & R., 441. 5. The liability of a surety in an official bond being contingent, suit cannot be brought against a surety by a party in interest without proceeding first against the administrator, and fixing him personally for the debt. *Comm. vs. Stub*, 11 Pa., 155. 6. Whenever an administrator absconds, conceals himself or resides outside the jurisdiction of the court, his sureties may be sued, without recourse in the first instance to the principal. *Comm. vs. Wenrick*, 8 W., 159. 7. The sureties in an ordinary administration bond are not liable for the proceeds of the sale of an intestate's land, nor are the sureties for the faithful application of the proceeds of the sale of real estate responsible for the disposition of his goods. Yet it has been held that the sureties on the bond of a guardian are liable for the proceeds of real estate afterwards sold by the guardian, although other security was given at the time of sale. *Comm. vs. Winters*, 12 Phila., 226. *Comm. vs. Loyd*, *Idem*, 221.

VI. NEGLECT OF CO-SURETY. A surety who pays his principal's debt, is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety, in the same manner as against the principal. *Hess' Estate*, 69 Pa., 272.

VII. NEGLECT OF CREDITOR TO PROCEED AGAINST PRINCIPAL. 1. The refusal by a plaintiff in a judgment against a principal and surety to issue execution upon it at the instance of a surety in order to levy upon the principal's property, is a good consideration for a promise to release the surety. In such case, it is not necessary for the surety to be able to prove that the debt might have been made upon the execution against the principal. *Bank vs. Klingensmith*, 7 W., 523. 2. It is a general rule, that when the intervention of a subsequent surety delays the payment of a debt, he will be liable to any prior surety whom he postpones or hinders. *Clapp vs. Senneff*, 7 Phila., 214. 3. A bill will lie in chancery by a surety to compel a creditor to sue his principal; and equity will act, in his refusal or neglect to sue, particularly where the condition of the

Surety—Continued.

surety will be thereby deteriorated. *Comm. vs. Wolbert*, 6 B., 300.

4. A surety in an obligation can be discharged, by nothing less than clear and positive proof of notice given to the creditors to proceed against the principal by one duly authorized to give it at a time when the creditor is able to proceed to collect his debt. *Conrad vs. Foy*, 68 Pa., 381.

5. A new contract with the principal, lessening the creditor's claim, does not discharge the surety. *Dickson vs. Wolf*, 5 W. N., 36.

6. Whether a surety can be proceeded against, before proceeding against his principal, depends, to some extent, upon the form of his obligation, but where he becomes liable in a joint and several contract to pay money, which his principal owes, he may be proceeded against in the first instance. *Domestic Sewing Machine Co. vs. Saylor*, 86 Pa., 287.

7. The gross negligence of a creditor, even of the obligee in a bond, may operate to discharge a surety, as where the surety requests him to proceed against the principal, in order to save the debt, and he neglects to do so. In some instances, a lapse of time will warrant a presumption of payment; but in other cases, the delay may be satisfactorily explained. *Eddowes vs. Niell*, 4 D., 133.

8. A creditor is not bound to resort to the principal for the collection of his debt, in the first instance; nor need he resort first to a lien, which secures it, but he may sue and recover from a surety. Collusion with the principal gives the surety an equity. The existence of a pledge or other security does not prevent an immediate recourse to the person. When the principal is discharged, either totally or on paying a part, the surety is discharged. Where the creditor, without the consent of the surety, gives time to the principal, the surety is discharged. But the bare negative act of refraining from suit against the principal will not discharge the surety. *Geddis vs. Hawk*, 1 W., 280.

9. A discharge of the debtor by the creditor will not discharge the surety, if there be an agreement between the creditor and the debtor, that the surety shall not be discharged. The reservation must appear on the agreement; it cannot be shown by parol evidence. The surety not being a party to the

Surety—Continued.

agreement, he could pay the debt and sue the principal. *Hagey vs. Hill*, 75 Pa., 108. 10. The mere omission of a creditor to collect his debt from his principal will not discharge the surety. When the surety desires to be released from his liability, it is his duty to notify the creditor to proceed and collect the debt, and upon failure or neglect of the creditor, a court of equity will grant relief to the surety. *Keller's Estate*, 1 Foster, 170. 11. Mere supineness on the part of a creditor would not prejudice his right to resort to the surety, unless the latter notified him to proceed. *Kindt's Appeal* 102 Pa., 443. 12. A creditor is not bound to exhaust the remedies of the law against his debtor, before proceeding against the surety. He is not bound to follow him into the bankrupt and insolvent courts, and his estate into the hands of assignees. The duty of reasonable diligence is discharged by the due issue of the proper process to the proper officer, and then trusting him to do his duty. *Kirkpatrick vs. White*, 29 Pa., 178. 13. Where the surety of the debtor applies to the creditor, and apprises him of the legal means of recovering his debt, and he declines to pursue it, whereby the opportunity of its being paid is lost, the surety is discharged. *Lichtenthaler vs. Thompson*, 13 S. & R., 157. 14. A surety on a lease cannot protect himself from liability, by alleging that the plaintiff did not use diligence in attempting to collect the rent, but allowed it to fall into arrears without notice to him. His undertaking is an absolute, not a conditional one. *Lightner vs. Axe*, 31 Lancaster Review, 401. 15. The notice required to be given by a creditor in order to discharge him from liability, should be clear and explicit to proceed and collect the debt. In the case of a note, the notice should be given after its maturity, and reasonable time to proceed should be allowed. *McDonough vs. Boyer*, 10 Phila., 616. *Building Ass'n vs. Benson*, 2 W. N., 541. 16. Where a distress is made for rent, and afterwards abandoned, a surety on the lease is discharged only to the extent of the value of the goods distrained. *McNamee vs. Cresson*, 3 W. N., 450. 17. Where a defendant, in cus-

Surety—Continued.

tody on an execution, gives bond with surety to take advantage of the insolvent laws, and forfeits his bond, a second execution may be issued. If, when again in custody, the plaintiff discharges him from prison without the assent of his surety, the debt is satisfied and the surety released. *Palethorpe vs. Leshner*, 2 R., 272. 18. A surety cannot avail himself of circumstances as a defence, which were occasioned by his own delay to do that which would have relieved him from payment of the money. *Shaeffer vs. McKinstry*, 8 W., 258. 19. Reading to the creditor a written notice to proceed against the principal debtor for the collection of the debt, without leaving with him the original paper, or a copy, is not notice in writing within the meaning of the act of May 14, 1874. *Smith vs. Brinser*, 1 Pa. Dist., 396. 20. When the property of the principal has been taken in execution by the creditor, the lien thus acquired cannot be relinquished without discharging the surety to an extent corresponding with its value. *Stephens vs. Bank*, 88 Pa., 157. 21. The right of a surety to discharge his obligation by notice to the creditor to pursue the debtor, is an incident of the contract of suretyship. If the surety does not exercise his right, his obligation remains intact. If the creditor pays no heed to the notice, and thereby fails to recover from the principal debtor, the surety is no longer liable. Very different is this from a defence of the statute of limitations. There the obligation of the contract is not terminated or defeated. *Tenant vs. Tenant*, 110 Pa., 485. 22. A creditor is not bound to sue on a bond immediately upon its becoming due, on penalty of losing the surety therein. Such an idea never prevailed in Pennsylvania. The security is not discharged by the mere omission to bring suit. *Thursby vs. Gray*, 4 Y., 518. *Comm. vs. Wolbert*, 6 B., 292. 23. Where a surety gave notice to the creditor to proceed and collect his money from the principal, and afterwards extended the time, and the creditor issued no process during such extension, in which period the creditor assigned all his property for the

Surety—Continued.

benefit of creditors, held, the surety was not discharged. *Weiler vs. Hoch*, 25 Pa., 525.

VIII. NEGLIGENCE OF CREDITOR TO SUE PRINCIPAL. 1. Even if the surety of a public officer is discharged from liability by neglect to bring suit against such officer, after notice by the surety that he will no longer be held unless suit is brought, it does not follow that the surety will be discharged if the defaulting officer has removed from the county where the liability was incurred before the notice was given. It would be an unreasonable requirement, that the public or its agents should follow the officer beyond the jurisdiction and bring suit against him in order to hold the surety liable. *Alcorn vs. Comm.*, 66 Pa., 176. 2. The mere omission by a creditor to bring suit against the principal debtor does not discharge the surety. If a creditor, after request so to do, refuses or neglects to sue the principal debtor, the surety is discharged, provided the request be proved clearly, and be positive, and accompanied with a declaration that, unless complied with, the surety will be deemed discharged. This had better be in writing. *Cope vs. Smith*, 8 S. & R., 110. *Greenawalt vs. Kreider*, 3 Pa., 267. *Gardner vs. Gardner*, 15 S. & R., 28. 3. The neglect of an obligee or payee to sue the principal, when requested by the surety, will not discharge such surety from the obligation, unless the request be accompanied by an explicit declaration by the surety, that if suit be not brought, he will consider himself discharged. *Erie Bank vs. Gibson*, 1 W., 143. 4. Delay in suing the principal, not arising from his request, does not release the surety, or his estate after his death. *Guldin vs. Faber*, 1 Walker, 435. 5. Where the creditor is a married woman, a notice by the surety to her husband to go on and collect the money loaned is not a notice to the wife. *Hellen vs. Bryson*, 40 Pa., 472. 6. A notice by a surety on an undue note, that he would not remain responsible if the holder did not sue the principal debtor as soon as the note came due, or get other security, will not discharge the surety. Such notice cannot be given by the surety until the debt is

Surety—Continued.

due. *Hellen vs. Crawford*, 44 Pa., 105. 7. A surety is discharged, if a creditor, after being requested to bring suit against the debtor, refuses or neglects so to do, particularly where the request is coupled with a declaration that the surety will hold himself discharged, and where the principal, meanwhile, has become insolvent. *Kemmerer vs. Yoder*, 1 Woodward's Decisions, 41. 8. Where one surety has been discharged because of the neglect of the plaintiff to sue the principal, after due notice and request to do so, the other surety not discharged may be sued for his proportion of the amount. *Klingensmith vs. Klingensmith*, 31 Pa., 460. *Shock vs. Shock*, 10 Pa., 401. 9. The mere omission of a creditor to sue the principal debtor, does not discharge a surety; but where the creditor has the means of satisfaction, either actually or potentially, in his hands, and does not retain it, the surety is discharged. When a surety applies to the creditor, and apprises him of any legal means of recovering his debt, and he declines, upon demand, made, to pursue it, whereby the opportunity of being paid is lost, the surety is discharged. Or if suit be brought by the creditor and be discontinued against the consent of the surety. Mere forbearance, however prejudicial to the surety, will not discharge him. He should quicken the creditor where occasion demands it. *Richards vs. Comm.*, 40 Pa., 149. 10. A surety upon a note is not discharged by notice to the holder to sue the principal debtor, unless the notice and the evidence of it are so clear and distinct, that the meaning of the surety can be at once apprehended without explanation or argument. *Shimer vs. Jones*, 47 Pa., 268. 11. Parol notice to sue given to a creditor, accompanied with a declaration that if he does not, the surety giving the notice will be discharged, will work a discharge of the surety, if the notice be not complied with. Notice to collect is notice to sue, if suit be necessary for collection. The burden is on the plaintiff to show that the money could not have been collected, if suit had been brought when requested. The presumption is that it could. *Strickler vs. Burkholder*, 47 Pa., 476. 12. It is not necessary for a

Surety—Continued.

surety personally to request the creditor to sue the principal debtor. The agent of the surety may do so. If the creditor himself be absent, leaving the obligation in the hands of an agent or attorney for collection, the request to sue the principal may be addressed to such agent or attorney of the creditor. The request to sue suffices without tender of expenses or stipulation to pay them, or an offer by the surety to take the obligation, and bring suit himself, unless the creditor at the time of the notice, expressly refuse to sue on the ground of the trouble and expense, and offers to proceed, if that objection be removed. The creditor is bound to commence his suit immediately after such request, and prosecute it diligently. *Wetsel vs. Sponsler*, 18 Pa., 460. *Thomas vs. Mann*, 28 Pa., 521. 13. Where a surety claims to be discharged from liability upon a note by reason of notice to the holder to sue the principal debtor, the evidence of the notice should be so clear and distinct that the meaning of the surety can be at once apprehended without explanation. *Wolleshlare vs. Searles*, 45 Pa., 45.

IX. NEGLECT OF NOTICE TO APPROVE. Notice of application to approve sureties should be given, or cause shown for the omission to do so. *Smith vs. Kerr*, 2 W. N., 222.

X. NEGLECT OF PRINCIPAL. 1. The liability of a surety is commensurate in duration with the commission of the principal. The contract of a surety, being without a beneficial consideration, is not to be extended beyond its strict technical import. It has been held, that even the death of one of two or more obligees determines the security. *Bank vs. Barrington*, 2 P. & W., 27. 2. Where a surety has signed the bond of a bookkeeper in a bank, conditioned for the faithful performance of his duties, and subsequently, without notice to the surety, the bookkeeper is promoted to the position of cashier, and embezzles large sums of money of the bank, the surety is not liable on his bond. *Minneapolis Bank vs. Keen*, 14 Phila., 7. 3. Under the act of March 29, 1832, the surety in the bond of any executor, administrator or guardian may apply to the

Surety—Continued.

court, whenever his principal is wasting or mismanaging the property under his charge, or is likely to prove insolvent, or has neglected or refused to exhibit true and full inventories or render full accounts, whereupon the court may order counter securities to be given to indemnify the surety against loss on his bond. The surety in such case is protected, but not discharged. *Newcomer's Appeal*, 43 Pa., 45.

XI. NEGLIGENCE OF PRINCIPAL TO PAY. 1. A surety of a defendant to entitle him to a stay of execution, who pays the judgment, is not entitled to be substituted as plaintiff, and have priority over subsequent judgment creditors. *Armstrong's Appeal*, 5 W. & S., 352. 2. In a judgment against a principal and surety, if the surety pays the amount of the judgment, he succeeds by operation of law to the rights of the creditor, and is entitled to collect the judgment out of the principal. It is not necessary that the paying surety should be subrogated under the act of April 22, 1856. *Duffield vs. Cooper*, 87 Pa., 443. 3. A surety, on paying a debt, is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal; provided, such subrogation shall work no injustice to the rights of others. *Erb's Appeal*, 2 P. & W., 297. 4. The words "I do hereby agree to be responsible for the faithful performance of the contract of the lessee" constitute a contract of suretyship, and the surety is liable immediately on the principal's default. *Frechie vs. Drinkhouse*, 4 W. N., 298. 5. Where a joint judgment debtor, who, in fact, was only as surety, was forced under execution to pay the whole judgment debt, and neglected to have the judgment marked to his use until more than a year after its payment, held, that because of his laches his claim for subrogation was not allowed, as meanwhile the property of the principal debtor had been sold. *Gring's Appeal*, 89 Pa., 336. 6. A surety is entitled to every remedy which the creditor has against the principal, to enforce every security and all means of payment, and to stand in the place of a creditor. He has a right to have these securities transferred to him, though this has not been

Surety—Continued.

stipulated, and if the obligee renders any such security which he took from the principal void, this discharges the surety. *Hawk vs. Geddis*, 16 S. & R., 28. 7. A surety in a bond, paying it to the creditor, is entitled to a cession of the debt, and a substitution or subrogation to all right of action of the creditor against the debtor. *Himes vs. Keller*, 3 W. & S., 401. *Griner's Estate*, 2 W., 414. *Foster vs. Fox*, 4 W. & S., 93. 8. Where one creditor has a judgment against principal and surety, and another has a judgment against the surety alone, and the creditor of the two collect his debt from the surety, the other creditor is entitled to the use of the judgment. *Huston's Appeal*, 69 Pa., 488. 9. A surety who pays the debt of his principal will be entitled to the securities of the creditor. So, where one of several joint sureties has paid the whole debt, he will be entitled to the judgment to enforce contribution by his co-sureties. Subrogation is purely an equitable result. *Mosier's Appeal*, 56 Pa., 80. 10. A surety is not, *ipso facto*, on payment of the debt of his principal, subrogated to the creditor's rights; his remedy is not *prima facie* on the bond, but for money paid. *Rittenhouse vs. Levering*, 6 W. & S., 190. 11. Where a surety pays an overdue debt, he has the right to recover what he pays from the principal debtor, who is considered as having requested him to pay the debt in receiving him as his surety. As soon as the surety pays the debt, he is deemed subrogated to all the remedies of the creditor against the person and estate of the principal. Where a decree of a court fixes the amount due by a principal, the surety need not wait until proceedings be had to collect it, involving costs, but may pay it at once, and seek to recover the amount from the principal. *Smith vs. Harry*, 91 Pa., 119. 12. A surety is entitled to all the rights and securities held by the plaintiff on payment of the debt by such surety. *Vail vs. Hartman*, 1 C. P. Reporter, 132. 13. The rule is, that if a surety has paid a debt, he is entitled to all the securities the creditor had against the principal debtor. If the claim be in judgment, he should be subrogated of record.

Surety—Continued.

Although actual payment discharges a bond or judgment at law, it does not in equity, when justice requires its survival for the safety of the paying surety. The paying surety is also entitled to all the remedies against the debtor. He is to be subrogated to all the rights and actions of the creditor against the debtor. He may compel payment by a co-surety of his proportion. *Wright vs. Grover Co.*, 82 Pa., 80.

XII. NEGLIGENCE OF PRINCIPAL AS TO ELOIGNED GOODS. In an action against the surety for non-payment of rent, it is no defence, that goods of the tenant distrained upon have been eloigned, unless the plaintiff or his bailiff has been guilty of negligence. *Myers vs. Hulseman*, 3 W. N., 487.

XIII. NEGLIGENCE TO APPROPRIATE SECURITIES. 1. If a creditor has in his hands the means of satisfaction, and chooses not to retain it, but suffers it to pass into the hands of the principal debtor, the surety shall be released *pro tanto*, unless he has consented thereto. *Bank vs. Thompson*, 3 Grant, 117. *Everly vs. Rice*, 20 Pa., 297. 2. There is no clearer rule in equity, than that where the creditor has the means of satisfaction in his hands, and chooses not to retain it, but suffers it to pass into the hands of the principal; the surety can never be called on. *Comm. vs. Miller*, 8 S. & R., 452. *Coatesville vs. Hope*, 1 Chester Co., 57. 3. Where a creditor had in his hands the means of paying his debt out of the funds of the principal debtor, and might have paid the same by reasonable diligence, and does not use the means thus within his control, the surety is discharged. *Fegley vs. McDonald*, 89 Pa., 128. *Clow vs. Coal Co.*, 98 Pa., 432. 4. A creditor is not bound to exert active diligence in favor of a surety, but if through his neglect a security which would have enured to the benefit of a surety is lost, it is a good defence in proceedings against the surety. *Hughes vs Ranken*, 7 Phila., 175. 5. When a creditor has power to receive a part of his debt out of the estate of the principal debtor, who is deceased, and does not avail himself of it, the surety will thereby be discharged, *pro tanto*. *Ramsey vs. Bank*, 2 P. & W., 203. 6. Even without

Surety—Continued.

any special agreement, it seems that the liability of the surety would be discharged in equity, if the creditor, having in his own hands funds of the principal debtor, neglected to apply them to the payment of the debt. *Reed vs. Garvin*, 12 S. & R., 100. 7. Where a creditor has the means of compelling payment from the principal debtor, and by his own act gives it up, he thereby discharges the surety. A surety, on payment of the debt of his principal, is entitled to be substituted to all the liens and other securities which the creditor holds ; if, therefore, substitution be rendered fruitless by any act of the creditor, a release results. *Templeton vs. Shakely*, 33 *Pittsburg Journal*, 11. 107 Pa., 380.

XIV. NEGLECT TO DEFEND SUIT AGAINST PRINCIPAL. A judgment against a constable for official misconduct, is conclusive against his sureties as to his misconduct and the extent of damages sustained by the plaintiff. Those who undertook to save a man harmless, are bound to take notice of any suit against him. They may, however, take advantage of any defence personal to themselves. *Masser vs. Strickland*, 17 S. & R., 354.

XV. NEGLECT TO DISCHARGE. 1. The ordering of new security does not discharge the old bond, nor can the orphans' court discharge a surety without the consent of those interested. *Comm. vs. Risdon*, 4 *Brewster*, 165. 2. A notice by a surety that he will not continue liable, is no defence to his covenant ; for he cannot dissolve the contract. *Vodges vs. Scott*, 4 *Lancaster Bar*, No. 3.

XVI. NEGLECT TO READ OBLIGATION. 1. If a surety sign a bond which he is not prevented from reading by any trick of the obligee, in ignorance of its contents, he cannot avoid his obligation on it because it is other than he thought it to be. *Johnston vs. Patterson*, 114 Pa., 398. 2. If a surety sign a bond which he is not prevented from reading by any trick of the obligee, without reading or having it read to him, in ignorance of its contents, he cannot avoid his obligation upon it. *Snyder's Estate*, 7 Kulp, 409.

Surety—Continued.

XVII. NEGLECT TO RETAIN ORIGINAL AGREEMENT. Any unauthorized variation in an agreement which a surety has signed that may prejudice him, or substitution of an agreement different from that which he entered into, discharges him. *Bensinger vs. Wren*, 31 **Pittsburg Journal**, 7.

XVIII. NEGLECT TO TERMINATE HIS LIABILITY. Where a surety on a lease gave due notice to the lessor to collect the rent from the lessee, and that he would not be bound beyond the end of the current year, held, it was inequitable to the surety to continue the tenant for another year after the notice. Equity often relieves a surety when the principal would not be relieved. A surety cannot at will discharge himself from his contract. *Pleasanton's Appeal*, 75 **Pa.**, 344.

Swine.

I. NEGLECT BY TRESPASSING. If a party who possesses a license to enter on the land of another, take down a gate erected thereon, to enable him to enter, and neglect to restore it to its place, whereby his swine are enabled to trespass upon the plaintiff's land, he is liable in trespass for the damages thereby occasioned. *Kissecker vs. Monn*, 36 **Pa.**, 313.

II. NEGLECT TO CONFINE. The owner of swine, who permits them to run at large without rings and yokes, in violation of the provisions of the act of 1705, is liable in an action of trespass for depredations committed by them upon the enclosure of another, irrespective of the character of the fences surrounding such enclosure. *Stewart vs. Benninger*, 138 **Pa.**, 437.

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Taxation.

I. NEGLECT IN ASSESSMENT. A farm divided by a township, borough or city line, is taxable where the mansion house is located. Where the house and most of the farm lie in the township, and but a small portion of the farm within the limits of an adjacent city, the whole farm is held taxable in the township. *Bausman vs. Lancaster*, 50 Pa., 208.

II. NEGLECT IN LEVYING. 1. Though the legislature impose a tax for a certain purpose, yet if the tax levied be clearly in excess of the sum required for the purpose, a court of equity will enjoin its collection to the extent of the excess. *Connor's Appeal*, 103 Pa., 356. 2. Equity may enjoin the collection of a tax levied without authority. Also where the tax levied is clearly in excess of the sum required. *St. Clair's School Board's Appeal*, 74 Pa., 252.

III. NEGLECT IN MAKING. A parsonage, though erected on ground appurtenant to a church, but not a part thereof, is not exempt from taxation. *Our Savior's Church vs. Montgomery Co.*, 29 *Pittsburg Journal*, 5.

IV. NEGLECT OF INDIVIDUAL RIGHTS. The legislature cannot, under the name of taxation, take private property for public use without compensation ; a special tax on an individual would infringe this restriction. Persons and things, however, may be classified for the purposes of taxation. *Durack's Appeal*, 62 Pa., 491.

V. NEGLECT TO MAKE RETURN OF PERSONAL PROPERTY. When a taxpayer refuses or neglects to make the return of his personal property liable for taxation, as required by the act of June 30, 1885, the assessor should make return for him from the best information he can obtain. *Van Nort's Appeal*, 5 *Lancaster Review*, 385. 5 C. P. Reporter, 229.

Taxes.

I. NEGLECT IN APPORTIONING. It is the duty of the receiver of taxes to collect the taxes as assessed. He cannot apportion them. He must collect the taxes out of the first execution, under which a part of the premises is sold. *City vs. McGonigle*, 4 Phila., 351.

II. NEGLECT IN ASSESSING AND COLLECTING. 1. Where a public officer or a public corporation collects taxes imposed by an act of assembly, and the same are paid without any such objection as to warn the officer or corporation that the collection is at his or its risk, and afterwards the statute is declared unconstitutional, the officer or corporation is not liable to an action for the recovery of the taxes so paid. A payment of taxes is not compulsory, because made under a threat that legal remedies for it will be resorted to. *Taylor vs. Board of Health*, 31 Pa., 73. 2. A tax collector who voluntarily relinquishes a valid levy upon personal property, sufficient in amount, upon the land, in payment of taxes due upon the same, cannot thereafter seize the personal property of a subsequent purchaser of the land, to enforce payment of the same taxes. *Baer vs. Livingood*, 2 Woodward's Decisions, 336.

III. NEGLECT IN PAYING. 1. After a voluntary payment of a tax, without a protest or appeal, it is too late for the taxpayer to complain of the assessment, or to ask that the money be refunded to him. *Birmingham vs. Kaolin Co.*, 4 Northampton Co., 129. 2. Voluntary payments of taxes made without duress of person or property, and without protest, objection or appeal, cannot be recovered, even where there is a mistake in the estimate of the amount of land upon which the taxes were assessed. *Patterson vs. Philadelphia*, 19 Phila., 303. 5 Lancaster Review, 333. 3. Seated lands may be sold for taxes, when personal property is not found upon them, in the same manner as unseated lands, but the owner shall have the right to redeem at any time within a year after receiving actual notice from the treasurer of the county where such lands lie, that they have been sold. *Broughton vs. Journey*, 51 Pa., 34.

Taxes—Continued.

IV. NEGLECT IN SALE FOR UNPAID TAXES. A sale for taxes without description, circumstance or name having any known relation to the land is bad. The land must be in some way identified from something appearing in the assessment. *Lyman vs. City*, 56 Pa., 488.

V. NEGLECT OF PURCHASER AT TAX SALE. If the purchaser at a treasurer's sale for taxes, has neglected to file a bond for the surplus moneys within two years after the sale, the deed to him is void. *Sutton vs. Nelson*, 10 S. & R., 238.

VI. NEGLECT OF RECEIVER OF TAXES. The purchaser of lands sold for taxes, cannot object to any irregularity in the assessment or the proceedings of the commissioners or treasurer. *Riddle vs. Bedford Co.*, 7 S. & R., 386.

VII. NEGLECT OF LIABILITY. A purchaser at sheriff's sale, is not liable for taxes levied upon the property after the date of the sale, but before the acknowledgment of the deed. *Speakman vs. Bank*, 9 Luzerne Register, 285.

VIII. NEGLECT TO APPEAL FROM ASSESSMENT. The remedy for an unfair or illegal assessment of taxes is by appeal to the county commissioners. If the party aggrieved neglect it, the collector must collect the tax, and no action lies against the borough to recover the sum, though payment was made under protest. *Wharton vs. Birmingham Borough*, 37 Pa., 371.

IX. NEGLECT TO COLLECT. 1. The city is not stopped from collecting back water rents from a purchaser at a sheriff's sale, by failing to collect the rents as they accrue. *Girard Life Ins. Co. vs. Philadelphia*, 12 Phila., 293. 2. A tax collector who neglects his duty, and does not collect taxes at the proper time, but pays them out of his own funds, has only a personal claim, and cannot claim priority over lien creditors. *Dollar Savings Bank vs. Bosworth*, 27 Pittsburg Journal, 45. 3. If the city failed to demand its claim for taxes from the sheriff after a public sale, or take the steps to obtain it, the lien will not follow the property in the hands of the purchaser at the sale. *Smith vs. Simpson*, 60 Pa., 169. 4. Where a land

Taxes—Continued.

owner goes to the county treasurer's office, and pays all the taxes demanded of him by the treasurer, his property cannot subsequently be sold for taxes which the treasurer by mistake failed to demand of him. *Pottsville Lumber Co. vs. Wells*, 157 Pa., 5.

X. NEGLECT TO EXEMPT CHARITIES. A charitable institution is not exempt from taxation on a vacant lot, separated by a street from the land on which the institution is built, and not necessary to the use of the charity. *Philadelphia vs. Aid Society*, 154 Pa., 12.

XI. NEGLECT TO PAY. 1. A subsequent owner and occupier of a premises is liable for a former owner, who has neglected to pay his taxes, and the personal property of such subsequent owner may be distrained on. Such subsequent owner must look for reimbursement to the former owner of the premises. *Niver vs. Perigo*, Legal Gaz. Report, 462. 2. The act of March 24, 1870, creating the office of collector of delinquent taxes, does not authorize the collector to sell the goods of a tenant for taxes due by the owner. *McAfee vs. Bumm*, 10 Phila., 157. 3. A tax-payer was informed by the auditor general that he owed no taxes to the state. Held, that he was not liable to any penalty for not paying them. *Comm. vs. Canal Co.*, 1 Pearson, 359. 4. Taxes assessed on seated lands are not, technically, a lien on the realty, but a personal charge against the owner; the right of distress on the goods being special and statutory, under the act of April 13, 1834. *Cohen vs. Griffiths*, 9 Luzerne Register, 155. 5. A direction that a life-tenant shall pay all taxes, does not refer to taxes due in the lifetime of the testator, and unpaid at his death. *Brolasky's Appeal*, 32 *Pittsburg Journal*, 2. 6. Taxes on real estate cannot be apportioned among the different persons who become owners of it during the year. The person charged at the beginning of the year is liable for the taxes of the entire year, though he alien the same. He should arrange the payment with the alienee. *Shaw vs. Quinn*, 12 S. & R., 299. *King vs. Building Ass'n*, 106 Pa., 165. 7. A tenant or

Taxes—Continued.

stranger whose goods may have been taken to pay taxes, will be treated as a surety and substituted to the rights of the party to whom the tax was coming. If justice requires it, the lien may be kept afoot for the benefit of such tenant. *Wallace's Estate*, 59 Pa., 401. 8. The household furniture of a federal army surgeon is liable to taxation in a city where he is stationed on duty, without the intention of acquiring a domicile. *Finley vs. Philadelphia*, 32 Pa., 381. 9. The legislature has power to impose penalties for the non-payment of taxes. This penalty is usually in the form of an increased percentage for the delay or interest at a fixed rate. A penalty may also be imposed upon the tax-payer, who improperly withholds information as to the condition and extent of his estate. *Fox's Appeal*, 112 Pa., 356.

XII. NEGLECT TO PRESERVE LIEN. The lien of a registered tax in Philadelphia is not preserved by the issuing of a *scire facias* more than five years from the first of January next after the tax is due, although it is within five years from the filing of the claim. *Philadelphia vs. Kates*, 150 Pa., 30.

XIII. NEGLECT TO PROSECUTE CLAIM FOR. A *scire facias* upon a city claim for taxes must be prosecuted to judgment within five years after issuing the same, or the lien of such taxes is lost. *Philadelphia vs. Scott*, 93 Pa., 25. 12 Phila., 450. *Philadelphia vs. Heisler*, 27 W. N., 213.

XIV. NEGLECT TO PROTEST AGAINST. After a voluntary payment of a tax, without a protest or appeal in the manner provided by law, it is too late for the tax-payer to complain of the assessment or to ask that the money be refunded. *Birmingham vs. Kaolin Co.*, 5 Delaware Co. 378.

XV. NEGLECT TO RECEIVE. A sale of land for taxes is void, where the owner of the land went to the county treasurer's office in good faith for the purpose of paying the taxes on the land, and used reasonable diligence to ascertain and pay them, and failed to do so by reason of an erroneous assessment and advertised list of sales. *Freeman vs. Conswell*, 2 Monaghan, 500.

Telephone Companies.

I. **NEGLECT IN IMPARTIALITY.** Telephone companies are subject to the rules which govern common carriers. Under the law of this state, they cannot discriminate between persons who are willing to pay the usual rates for using the telephone. *Comm. vs. Bell Telephone Co.*, 17 Phila., 405.

II. **NEGLECT IN OBSTRUCTING HIGHWAY.** 1. A sagging telephone wire extending over a public highway caught the driver of a furniture wagon, threw him to the ground and caused his death. There was evidence that the wire had been in this dangerous condition for some time. Held, that the evidence of the negligence of the company was for the jury. *Varnau vs. Telephone Co.*, 5 **Lancaster Review**, 97, 401. 2 **Monaghan**, 645. 2. It is the duty of a telephone company using a public highway for its poles and wires, to so construct and maintain its line as not to incommode the public use of the highway for purposes of travel. *Central Telephone Co. vs. Ry. Co.*, 1 Pa. Dist., 628.

Telegraph Companies.

I. **NEGLECT IN BREAKING THE WIRES.** Where a telegraph company has strung its wires across a road, a party who wilfully breaks the wires is liable to a penalty. In the present case, a party in removing his house from one location to another, found the wire of the company to be in his way and broke it. The act of the defendant, in moving his house, was a lawful one, and the company located the wire subject to such contingencies in the use of the highway. *Telegraph Co. vs. Wilt*, 1 Phila., 270.

II. **NEGLECT IN DELIVERING MONEY.** In the case of unintentional delay in the delivery of money by a telegraph company, whereby plaintiff's note was protested, there can be no recovery for mere loss of credit by reason of the protest without showing pecuniary loss. *Smith vs. Telegraph Co.*, 150 Pa., 561.

III. **NEGLECT IN DISCLOSING MESSAGES.** The act of April 17, 1851, prohibiting the operators or agents of a tele-

Telegraph Companies—Continued.

graph company from disclosing telegraphic communications, does not apply in cases when it is material for such disclosures on trial in a court of justice. The offender is only liable, when he wantonly or voluntarily and unlawfully exposes the secrets of the telegraph office. *Henisler vs. Freedman*, 2 Parsons, 279.

IV. NEGLIGENCE BY ERRONEOUS MESSAGE. 1. Actual notice of a regulation that a telegraph company will not be liable for error in a message, unless the message be repeated, must be proved, to excuse negligence. The notice to repeat must be so full, clear and explicit, that it would be negligence in the plaintiff to disregard it. *Harris vs. Telegraph Co.*, 9 Phila., 89. *Passmore vs. Telegraph Co.*, *Idem*, 90. 2. A telegraph company is not excused from liability to third persons for damages sustained by the negligent transmission of an erroneous message, by the fact that the sender did not pay for its being repeated, in accordance with a rule of the company limiting its responsibility to the transmission of messages that should be repeated. *New York Telegraph Co. vs. Dryburg*, 35 Pa., 379. *Tobin vs. Telegraph Co.*, 146 Pa., 375. 3. A telegraph company is liable in damages, to the recipient of a message, for the misfeasance of their agent in sending a different message from that addressed to him. The fact that the sender did not pay for its repetition, in accordance with a rule of the company, does not excuse its liability. *N. Y. Telegraph Co. vs. Dryburg*, 35 Pa., 298. 3 Phila., 408. 4. A telegraph company is responsible for the accurate transmission of messages entrusted to it. Where, through the negligence of its agent, a telegraph is altered or in any respects untrue, the company is liable for the error. *Richman vs. Telegraph Co.*, 18 Phila., 371.

V. NEGLIGENCE TO PROMPTLY DELIVER TELEGRAM. 1. In the event of the failure to deliver with reasonable despatch a cipher telegram, where the company had not been informed of its contents, the damages are merely nominal, or the sum paid for its transmission. *Ferguson vs. Telegraph Co.*, 16 Pa. County, 102. 2. Where a telegraph company was guilty of

Telegraph Companies—Continued.

gross negligence in not delivering promptly a prepaid message ordering the purchase of stock, which advanced in price between the time the message should have arrived and the time it was purchased under another order, held, that the advance was the measure of damages. *United States Telegraph Co. vs. Wenger*, 55 Pa., 262. 3. A general strike of the employees of a telegraph company and concerted refusal to work, is sufficient to justify it in affixing conditions to the acceptance of messages for transmission over its wires, so as to relieve the company from liability for delay. *Comm. vs. Telegraph Co.*, 5 Lancaster Review, 94.

VI. NEGLECT OF ACCURACY IN TELEGRAM. 1. When a person receives an insensible telegram, no loss growing out of an incorrect construction of it will give him a right of action against a telegraph company. It is his duty to ascertain whether the message has been accurately sent, and to ask the sender to explain its meaning. If he takes upon himself the interpretation of it, the risk of loss arising thereout will be wholly his own. *Nusbaum vs. Telegraph Co.*, 17 Phila., 340. 2. Telegraph companies are public agents, and as such bound to exact diligence; and liable to every one injured by a want of due care on their part or that of their agents. Such companies may prescribe rules to insure safety, and may declare that if they are not observed the party injured shall be precluded, on the doctrine of contributory negligence; such rules must be reasonable. One sending a message and not asking it to be repeated to ensure its accuracy, is taken to have acquiesced in the conditions prescribed by the rules, and cannot object to a precaution which he has waived. *Passmore vs. Western Union Telegraph Co.*, 78 Pa., 238. 3. A rule of a telegraph company, that its responsibility for accuracy in the transmission of messages over its lines shall be restricted to repeated messages, and that any claim for damages must be made in writing within sixty days is reasonable, and, unless waived, is binding upon one who sends a message with knowledge of it. *Western Union Telegraph Co. vs. Stevenson*, 128 Pa., 443. 4. In

Telegraph Companies—Continued.

an action against a telegraph company to recover damages for delay in the transmission of a telegram, the face of the message ought to contain something to put the company on its guard; but when the alleged damage arises from erroneous transmission, it is no defence that the face of the telegram does not disclose its meaning. *Western Union Telegraph Co. vs. Landis*, 21 W. N., 58. 5. Where an action is brought for the loss sustained by acting upon a telegram, which owing to the negligence of the agents of the telegraph company was altered, the action sounds in tort, and is for a loss wholly different from that which the sender sustained through the non-performance of the contract. While the sender of a dispatch is estopped from action against the company under his contract for failure to repeat his message to ensure its accuracy, such condition does not apply to the receiver of the message. *Western Union Telegraph Co. vs. Richman*, 19 W. N., 569. 6. Where a telegraph company is sued for damages for failure to transmit a message, and relies upon the contract on the telegraph blank limiting its liability to its own lines, its affidavit of defence must give the facts as to its own handling of the message, the time at which and the place to which it was sent. A stipulation in the contract of a telegraph company, that claims for damages must be presented in writing within sixty days is reasonable, except where the telegram is sent to a very great distance. *Conrad vs. Telegraph Co.*, 162 Pa., 204. 7. Plaintiff's statement of claim, in an action of *assumpsit* to recover damages for delay in transmitting a telegraphic message to a correspondent to purchase certain goods at a specified price, was defective in not averring that at the time the order should have been delivered the goods could have been purchased at the price named. *Ferguson vs. Telegraph Co.*, 151 Pa., 211. 8. Where a telegram was incorrectly transmitted, the measure of damage is the actual loss incurred as the result of the error. *Western Union Telegraph Co. vs. Landis*, 35 *Pittsburg Journal*, 505. 9. One of the conditions of a telegraph company printed on the blank form of the message in small type, but

Telegraph Companies—Continued.

with conspicuous heading, was that the company would not be liable for damages if the claim was not presented in sixty days from sending the message. Held, that the condition was binding on one sending a message on the printed form. *Wolf vs. Telegraph Co.*, 62 Pa., 83.

VII. NEGLIGENCE IN WORDING TELEGRAM. 1. Where the sender of a message negligently wrote the word "two" so that it could be read "ten," and sent the despatch to the telegraph office by a small boy who could not explain it, the company is not liable for a mistake in the amount as telegraphed. *Koons vs. Telegraph Co.*, 12 W. N., 49. 2. Where the sender of a message, intending to write a certain word, negligently writes what more nearly resembles another word, the telegraph company is not liable for damages caused by transmitting the word as it appeared to be written. *Koons vs. Telegraph Co.*, 102 Pa., 164.

Tenancy in Common.

I. NEGLIGENCE OF CO-TENANT. 1. A tenant in common is liable to his co-tenant for repairs that are absolutely necessary to houses and mills already erected, which fall into decay. *Beatty vs. Bordwell*, 91 Pa., 438. 2. One tenant in common has no power to bind his co-tenant by an agreement with another to lease their lands. *McKinley vs. Peters*, 111 Pa., 283. 3. Where there were joint owners of real estate, with the title in one who made sale of the lands and mingled the money received therefor with his own; held, that upon a settlement of his account with his co-tenant he was chargeable with interest upon interest. Money thus received is trust money, and the rules which forbid the allowance of interest upon interest do not apply. *Roberts' Appeal*, 92 Pa., 487.

II. NEGLIGENCE TO PAY RENT. A tenant in common cannot recover in *assumpsit* against his fellow for the use and occupation of the common property, without an express contract to pay rent, as each tenant has an equal right to the possession of

Tenancy in Common—Continued.

the whole. Account, under the statute of Anne, was the only remedy. *Kline vs. Jacobs*, 68 Pa., 57.

III. NEGLECT TO PAY MATERIAL MAN. Materials were furnished on the contract of one tenant in common, who was in possession. A lien could be entered against him as owner of the premises and a judgment had which would bind his interest. *Keller vs. Denmead*, 68 Pa., 449.

Tender.

I. NEGLECT IN AMOUNT. A tender under the act of March 12, 1867, must be of the amount which the defendant admits to be due, with all lawful costs to date. *Horan vs. Flanigen*, 5 C. P. Reporter, 127.

II. NEGLECT IN FORM. The tender of a check in payment of a note, will not support a claim for set-off, unless the defendant still tenders at the trial. *Mountain City Banking Co. vs. Moyer*, 14 Luzerne Register, 197.

III. NEGLECT IN MAKING. 1. A tender, to be a legal one, must be for the full amount due, and must be kept up at every stage of the action. The proper course would be to pay the money into court upon leave obtained. The rule that the money must be counted in coin or legal tenders is dispensed with if the creditor refuses to receive it before it is counted. *Eckman vs. Hildebrand*, 1 Delaware Co., 509. 15 Lancaster Bar, 49. *Fox vs. Sheldrake*, 1 Delaware Co., 27. 2. If a contract be for bullion, the very thing contracted for must be offered, as in the case of other contracts for the delivery of merchandise. The tender of a debt cannot be objected to as insufficient, because the currency has been debased since the debt was contracted. *Borie vs. Trott*, 5 Phila., 366. 3. A legal tender is where a debtor offers to his creditor legal money, gold, silver or legal tender paper money sufficient to pay all legal debt which has matured and the full interest thereon. If made after suit commenced, it must also include all costs that have been incurred up to the date of such tender. A tender must be wholly unconditional. *Eckman vs. Hickman*, 1 Lancaster Review, 41.

Tender—Continued.

IV. NEGLECT IN TERMS. A tender, to be equivalent to payment of a debt, must be unconditional. *Forest Oil Co.'s Appeal*, 35 *Pittsburg Journal*, 261.

V. NEGLECT TO ACCEPT. 1. A judgment creditor is not bound to accept his debt from a stranger to the judgment. *Nesbit vs. Martin*, 4 Pa. County, 95. 2. Where there has been a tender of the amount due before suit brought, and afterwards judgment for want of a sufficient affidavit of defence given, no costs can be allowed. *North Penna. Ins. Co. vs. Ins. Co.*, 2 Pearson, 289. 3. In trover, after the plaintiff has demanded his goods, and the defendant refused to deliver them, he is not bound to accept a tender of them where they have deteriorated in value since the conversion. *Whitaker vs. Houghton*, 86 Pa., 48. 4. Under the act of April 9, 1833, if a defendant on the trial of a cause before a justice, or before an appeal is taken, shall offer to give the plaintiff a judgment for the amount which the defendant shall admit to be due, which offer it shall be the duty of the justice to enter on the record, and if the plaintiff or his agent, after notice of the tender, which service of notice shall also be mentioned on the record, shall refuse to accept such offer, and subsequently after appeal, shall recover no larger sum in court, the plaintiff shall pay all the costs of the appeal. *Driesbach vs. Moore*, 94 Pa., 25. 10 *Luzerne Register*, 42. 5. The admitted sum brought into court becomes the money of the plaintiff, and if the jury award an amount equal to or less than the tender, the verdict goes for the defendant, carrying with it a judgment for costs. The plaintiff is entitled to the entire sum tendered in any event. *Wheeler vs. Woodward*, 66 Pa., 158.

VI. NEGLECT TO MAKE. 1. When one purchases a chattel for another, he may sue for the money without a tender of the thing; the delivery of the thing cannot be demanded until the money is paid or tendered. *Esser vs. Linderman*, 71 Pa., 76. 2. As a condition precedent to an action of trover, a demand or tender must be made by the plaintiff, but the tender of money is unnecessary in the case of stocks and bonds,

Tender—Continued.

where they had been wrongfully converted by the defendant pledging them for his own debt, and a sale afterwards by the pledgees, without notice to the plaintiff. This dispensed with any necessity for tender of the amount of the debt for which they had originally been pledged. *Work vs. Bennett*, 70 Pa., 488. 3. Where there has been fraud in a contract, the defrauded parties thereto can rescind and recover the price paid; but the tender should be in a reasonable time after discovery of the fraud. By an undue delay in tender and rescission, the contract would be affirmed. *Leaming vs. Wise*, 73 Pa., 173.

VII. NEGLECT TO PLEAD. A tender must be pleaded, and the record must show it. A tender before arbitrators should be noted in the proceedings, and made matter of record. *Vosburg vs. Reynolds*, 5 Kulp, 228, 376. 1 Lackawanna Jurist, 92. 1 C. P. Reporter, 107.

Theatres.

I. NEGLECT IN EJECTING TICKET-HOLDER. Plaintiff's wife was ejected from the theatre so violently, that she was injured. Held, that an action on the case by the husband for the loss of his wife's services, was proper. It need not be trespass *vi et armis*. *Drew vs. Peer*, 28 Pittsburg Journal, 38.

II. NEGLECT TO FULFIL CONTRACT. Where theatrical managers engage a performer for a certain position, and subsequently assign her a lower one, she cannot be compelled to take the part, but may declare the contract forfeited and sue the managers for any loss she may have sustained. *Roserie vs. Kiralfy*, 12 Phila., 209.

III. NEGLECT TO PROTECT SPECTATORS. Where an accident occurred to a spectator in the front row of the theatre, by an acrobat falling upon him from a trapeze, it was held, by an equally divided court, that the manager of the theatre was liable in damages for the unskillfulness of the performer. *Fox vs. Dougherty*, 2 W. N., 417. 23 Pittsburg Journal, 142.

IV. NEGLECT TO RESERVE SEATS. The neglect of the

Theatres—Continued.

proprietor of theatre to mark a seat "taken," can give a stranger no right to a seat which had already been purchased by a third party. *Comm. vs. Powell*, 10 Phila., 180. 4 Legal Opinion, 618.

Timber.

I. NEGLECT TO SECURE. Logs carried adrift by floods continue the property of the original owner. *West Branch Exchange vs. Enterline*, Northumberland Co. News, 269.

II. NEGLECT IN CUTTING. 1. Under the act of March 29, 1824, any party cutting timber without consent on the lands of another, shall be liable to pay to such owner double the value of such trees, or, in case of the conversion thereof, treble the value thereof, with costs of suit. *Allen vs. Liggett*, 81 Pa., 486. 2. The mortgagor of real estate may continue, after the execution of the mortgage, as before, to cut and sell the timber growing upon the premises, without violating the rights of the mortgagee. *Angles vs. Agnew*, 98 Pa., 587. 3. The timber act of March 29, 1824, imposing double and treble damages for cutting the timber of another without his consent, does not apply to a corporation entering upon the land of another under the right of eminent domain. In giving damages in other cases for unlawfully cutting another's timber and converting it to one's own use, it will be presumed the jury gave all the damages authorized by statute. Unless the verdict itself shows but single damages, the court cannot double or treble the damages. *Bethlehem Gas Co. vs. Yoder*, 112 Pa., 136. *Clark vs. Sargeant*, *Idem*, 16. 4. An injunction will issue to restrain the destruction of a tree growing in a rural or suburban locality, on the line between two adjoining properties, at the instance of one of the owners. *Comfort vs. Everhardt*, 35 W. N., 364. 5. Cutting timber on the land of another, without color of title, is destructive to the freehold, and may be denominated destructive trespass. Equity will enjoin against the commission of such acts, where the party is insolvent. *Eckert vs. Ferst*, 10 Phila., 514. 1 Foster, 304.

Timber—Continued.

6. A preliminary injunction will be granted to restrain the cutting of growing timber on lands about which there is dispute as to ownership. *Kerns vs. Harbison*, 3 York Record, 154. 1 Chester Co., 506. 7. The act of March 29, 1824, imposes a penalty of treble damages upon any one cutting and converting to his own use the timber growing upon the land of another, without the owner's consent. This was intended only to prevent the wilful or careless cutting of another's timber. Where, however, the owner of the land, by his own positive acts, misleads his neighbor as to the extent of his claim, though unintentionally, he cannot avail himself of the provisions of this act. *Kramer vs. Goodlander*, 98 Pa., 353. 8. Cutting down timber to the prejudice of the inheritance is waste, and may be restrained by proceedings in equity. *Raydure vs. Smith*, 19 Pittsburgh Journal, 121. *Smith & Fleet's Appeal*, 69 Pa., 474. 9. It is not waste for a life tenant to cut dead and decaying timber. He may also cut down trees if they impede cultivation, and if good husbandry requires their removal. The common law of England was very strict in regard to waste. Its rigor has been much relaxed here, especially in the matter of timber. This was to be expected in a new country, where land was far more valuable without timber than with it. *Sayers vs. Hoskinson*, 110 Pa., 473. 10. Under the act of March 29, 1824, one cutting timber on another's land and converting it is liable to treble damages, although done without knowledge that it was not on his own land. It is incumbent on the person cutting to ascertain where the line is. *Watson vs. Rynd*, 76 Pa., 59. 21 Pittsburgh Journal, 180. 11. An indictment will lie for destroying a tree standing on public ground. *Comm. vs. Eckert*, 2 Browne, 249. 12. To hold a defendant liable for treble damages for cutting timber, it is not necessary that he was actually seen cutting it; if he authorized or ratified the trespass, it is sufficient. *Whitney vs. Backus*, 149 Pa., 29. *McCloskey vs. Howell*, 123 Pa., 52. *Kramer vs. Goodlande* 10 W. N., 469.

III. NEGLIGENCE IN MANUFACTURING CHARCOAL. The collier

Timber—Continued.

is bound to exercise ordinary care, skill and diligence in changing wood into charcoal. *Gamber vs. Wollaver*, 1 W. & S., 60.

Time.

I. NEGLECT, BY DELAY. Whenever, by a rule of court, or an act of assembly, a given number of days are allowed to perform an act, the day on which the rule is taken or the decision made is excluded, and if one or more Sundays occur within that time, they are counted, unless the last day falls on Sunday, in which case the act may be done on the next day. *Goswiler, In re*, 3 P. & W., 200.

II. NEGLECT IN COMPUTING. 1. Where a statute requires a thing to be done within a certain time from a prior date, and deprives the party of a right for omitting it, the day from which the count is to be made should be excluded in computing the time within which the act may be done. When, in such case, the last day falls on Sunday, that day is also to be excluded from the computation, and the party has the whole of the following day to perform the act, except in the case of negotiable paper. *Edmundson vs. Wragg*, 104 Pa., 500. *Hogg vs. Loughery*, 3 W. N., 516. *Menges vs. Frick*, 73 Pa., 137. 2. When a computation is made from an act done, the day on which the act was done must be included; but when the computation is from the day itself, then the day is excluded. *Hampton vs. Erenzellér*, 2 Browne, 18. *Hogg vs. Loughery*, 24 Pittsburg Journal, 139. 3. The word "month," used without explanation in a sentence of imprisonment, means a month of twenty-eight days. *Comm. vs. Martin*, 40 Pittsburg Journal, 256. 2 Pa. Dist. 330.

III. NEGLECT TO NOTE FRACTIONS OF A DAY. 1. Where a mortgage is recorded on the same day as a judgment against the mortgagor, fractions of a day are disregarded, and the liens take the proceeds of a sale *pro rata*. *Eichbaum vs. Claasen*, 1 Pittsburg Journal, 166. *Long's Appeal*, 2 Idem, 38. 2. The law will not take notice of fractions of a day, unless

Time—Continued.

where it is to prevent great mischief or inconvenience. *Simpson vs. Mancill*, 17 Phila., 265. 1 Lancaster Review, 125.

IV. NEGLECT TO SPECIFY. 1. Where a bond is conditioned for the payment of a certain sum, and no time is fixed for payment, it is in law a covenant for immediate payment. *Rhoads vs. Reed*, 89 Pa., 436. 2. In a suit in trespass for damages for injuries, the declaration must allege with certainty the time when the injury was inflicted. *Lindaur vs. Vankirk*, 4 W. N., 324.

Title to Land.

I. NEGLECT BY ABANDONMENT. 1. If the tenant leaves the premises for five months, for a special purpose, with the intention of returning, the continuity of his possession is not broken. *Cunningham vs. Patton*, 6 Pa., 355. 2. Abandonment is not always a question of intention, exclusively for the jury. *Atcheson vs. McCulloch*, 5 W., 13. *McDonnald vs. Mulhollen*, 5 W., 173. *Jacobs vs. Figard*, 25 Pa., 47. 3. To constitute an abandonment, there must be an actual relinquishment of possession by the settler, without the intention of returning. It is not always a matter of fact; it may be a conclusion of law from facts. *Miller vs. Cresson*, 5 W. & S., 284. 4. Where settlement on land west of the Allegheny river has been made, the commonwealth alone can take advantage of its abandonment; it cannot be alleged by an intruder in defence of his own possession. *McCall vs. Anchors*, 14 Pa., 253. 5. A title may be lost by abandonment. If so, it falls back to the state, but it is never transferred thereby to an adverse claimant. It is not the business of the treasurer to determine between conflicting claims. *Orr vs. Cunningham*, 4 W. & S., 294. 6. In order to preserve a pre-emption right to land, a personal residence must be kept up and continued upon it, until the purchase money is paid, a warrant obtained and survey made. To leave the land without *animus revertendi* is a legal abandonment. *Pfoutz vs. Stell*, 2 W., 409. 7. Ordinarily, abandonment of land involves a question of

Title to Land—Continued.

intention for the determination of a jury ; but when it depends on lapse of time, it becomes after seven years a conclusion of law. *Raush vs. Miller*, 24 Pa., 277. *Emery vs. Spencer*, 23 Pa., 271. 8. Abandonment, by a settler, depends upon intention, but in this respect there is no resemblance between a settler and an adverse occupant. Residence, though necessary to constitute settlement, is not necessary to constitute adverse possession. The latter may be by cultivation or enclosure. *Stephens vs. Leach*, 19 Pa., 262. 9. An asserted right to lands resting in settlement alone, has been justly termed a *jus vagum*, a mere claim to favor. It is not on the same footing as titles held under warrants and surveys returned into office. Vigilance is the price of safety, and a warrantee should have his survey returned in due time, or he will be postponed to a younger warrant, prosecuted with due diligence. He should not stand idly by, and see another party pay the taxes and exercise rights of ownership. *Bank vs. Woods*, 11 Pa., 99. *Sample vs. Robb*, 16 Pa., 319.

II. NEGLECT IN MAKING TITLE. A delay in making title, where time is not the essence of the contract, and the delay is unavoidable or acquiesced in by the vendee, is no ground to refuse a decree of specific performance. *Morgan vs. Scott*, 26 Pa., 51.

III. NEGLECT TO CLAIM. 1. Silence will postpone, only where silence is a fraud, and a fraudulent concealment cannot be imputed to one who is ignorant, that he had a title to conceal. But positive acts, for the consequence of which the doer is answerable, without regard to his ignorance or knowledge, stand on a different ground. For there his title may be postponed, even without fraud, on the ground that where a loss must necessarily fall on one of two innocent persons, it shall be borne, by him whose act occasioned it. *Robinson vs. Justice*, 2 P. & W., 22. *Beaupland vs. McKeen*, 28 Pa., 124. 2. When a man encourages another to settle on land and improve it, and to expend his money and labor upon it, he shall not afterwards be permitted to take it away from him,

Title to Land—Continued.

although he has an older and better title, and although his encouragement was given in ignorance of his own rights.

Willis vs. Swartz, 28 Pa., 417. 3. Notice to a bidder at sheriff's sale, that another claims the land, places him in the same situation in regard to a trust, as he as whose property it was sold. It is not necessary that the notice be full and entire. Notice to counsel is presumptive notice to the client. *Barnes vs. McClinton*, 3 P. & W., 67. 4. If one, knowingly, though passively, suffers another to purchase and spend money upon land, under an erroneous belief of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice. In equity, when a man has been silent, when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. *Carr vs. Wallace*, 7 W., 394. *Epley vs. Witherow*, *Idem*, 163. *Young vs. Babilon*, 91 Pa., 283.

IV. NEGLECT TO DISAFFIRM SALE. A neglect by a person for fourteen years to disaffirm a sale of land, made during minority, is not necessarily an affirmance of the title. *Urban vs. Grimes*, 2 Grant, 96.

V. NEGLECT TO EXAMINE. He who purchases land, knowing the title to be defective, takes the whole risk upon himself, and is not afterwards entitled to compensation for improvements made upon it. The rightful owners may recover the land by ejectment, although they saw the improvements being made, and did not object. *Walker vs. Quigg* 6 W., 87. *Foch vs. Beidelman*, *Idem*, 339.

VI. NEGLECT TO NOTIFY INTRUDER. A party, whose deed to real estate has been duly recorded, is not bound to give actual notice of his title to another, who, claiming under another title, and being in possession, is about to make improvements on the property, the deed to the latter containing a reference to the deed to the former. *Knouff vs. Thompson*, 16 Pa., 357.

VII. NEGLECT TO OBTAIN. If a stranger enter on the

Title to Land—Continued.

land of another, and make improvements by erecting buildings, they become the property of the owner of the land. *Crest vs. Jack*, 3 W., 238.

Title Companies.

I. NEGLECT OF SOLICITOR. A real estate title company is liable for the loss of a fund received by the solicitor of the company, while acting within the apparent scope of his duties, and embezzled by him. *Independent Building Ass'n vs. Title Co.*, 156 Pa., 181.

Tow-boats.

I. NEGLECT, RESULTING IN COLLISION. 1. Where two steam vessels on a clear day are running in the same direction, and the vessel astern is the faster boat, it is her duty to slacken her speed or take other precautions against a collision. *Nixon vs. The George Lysle*, 27 Pittsburg Journal, 170. 2. Where two steam vessels approaching each other from opposite directions both failed to comply with a rule of navigation, and as a result a collision occurred, in a suit against the two boats, the damage resulting to the owner of the cargo in one of the boats will be equally divided between the boats. *Phoenix Ins. Co. vs. The Sam Brown*, 34 Pittsburg Journal, 250.

II. NEGLECT IN CUTTING ROPES. The plaintiff, a deck hand on a tow-boat, was sent to loosen the rope that held the boat to a tree on the shore. Failing to do so, he cut the rope with an axe, causing it to rapidly unwind, and strike and break his leg. Had he cut the rope forward of the knot, instead of behind it, he would probably not have been injured. Held, that the contributory negligence of the plaintiff occasioned the injury. *Brown vs. Wood*, 2 Monaghan, 115.

III. NEGLECT IN DESTROYING PROPERTY. The owner of a tow-boat has no right to destroy the coal boat of another, which is sunk in the channel, in the general interest of navigation, but only where the owner of the former will save a

Tow-boats—Continued.

serious loss to himself thereby. *Gumbert vs. Wood*, 146 Pa., 370.

IV. NEGLIGENCE IN MANAGING. In a contract for towing, a stipulation, "this barge is towed at the risk of the masters and owners by special contract," meant that the towers did not assume the liability of common carriers, nor insure the safety of the barge, and did not reduce the liability of the towers from ordinary to gross negligence. The court properly charged that the defendants, if guilty of negligence, are not exonerated by reason of the non-compliance of the plaintiff with the stipulations of the printed contract, unless the loss was occasioned by that non-compliance, or it contributed in some degree to it. *Delaware & Chesapeake Tug-boat Co. vs. Starrs*, 69 Pa., 36.

V. NEGLIGENCE IN TOWING. 1. Steam tow-boats or tugs are not common carriers as regards the vessels they have in tow and their cargoes. The common law rule as to common carriers applied to goods only, and not to vessels. *Brown vs. Clegg*, 63 Pa., 51. 2. The owners of a tow-boat are not common carriers. Where, in attempting to tow some coal barges, three of them were lost by collision with barges that were moored on the river bank, the burden of showing negligence was upon the owners of the barges. Having given evidence to show that the loss was from the negligence of the engineer and pilot of the tow-boat, evidence that those officers were competent, skillful and careful, was inadmissible. If the evidence had shown incompetence and want of fitness, and loss from such cause, then evidence of competency might have been admissible. Like other bailees of the same class, the owner or operator of a tow-boat is only bound to use such a reasonable degree of care, that the owner of the barges towed shall incur no damage through the negligence of him or of his servants. *Hays vs. Millar*, 77 Pa., 238. 18 Pittsburgh Journal, 294. 3. If the officers of a tug, with a boat in tow, give the boat insufficient orders, or give them too late, it is negligence on the part of the tug. The tugboat captain should know the

Tow-boats—Continued.

capabilities of the tug, and its practical effect upon the boats in tow, including the power of his paddles, the influence of the current, the swell produced and probable influence it would reach. It would be negligence on his part to undertake to tow a flat-boat if too heavily laden. *Hays vs. Paul*, 51 Pa., 134.

4. In an action on the case for negligence against the owners of a tow-boat for an injury done to the boat she was towing, it is no defence that the captain of the latter gave directions and advice to the pilot of the tow-boat, which he followed at the time of the accident. *Hill vs. Rogers*, 1 Pittsburg, 163.

5. The owners of a tow-boat are not liable, as common carriers, for the safety of the boats and their contents towed by them. If the owners of the tow furnish the fastenings, and they break, this is *prima facie* evidence of their inefficiency, and the owners are liable for any loss occasioned by such defect. *Leech vs. Steamboat*, 1 Phila., 144.

6. Proper skill and caution in performing towage service is such as persons of ordinary prudence, duly qualified for the business of towage, and exercising care of the interests entrusted to them, ordinarily use. *Miller vs. Tow-boat*, 7 Phila., 597.

7. It is the duty of a tug-boat, in making up a tow, to consider the character of the vessels which are to compose it and the channels through which they are to pass. If the captain of a tug-boat takes in tow two vessels, one of which he knows to have bad steering qualities, in consequence of which an accident happens to the other vessel, his boat will be held liable for the damage. *Orhanovich vs. Tug America*, 14 Phila., 515. *Ship Josephine, vs. Tug Farnsworth, Idem*, 587. *Dun vs. Young America, Idem*, 532. *Barque Rebecca vs. Tug America, Idem*, 435t. *Hope vs. Transportation Co.*, 1 W. N., 394. *Ceres, In re*, 7 W. N., 576. *Brown vs. Riddle*, 2 W. N., 362.

VI. NEGLECT OF CARE. The captain of a tug-boat cannot limit his responsibility by a notice given at the time of commencing the trip, that it must be at the risk of the boat towed. The steam-tug is bound, notwithstanding such notice, for the exercise of all that skill and care which the circum-

Tow-boats—Continued.

stances of the case demand. *Vanderslice vs. Tow-boat*, 4 Clark, 388.

VII. NEGLIGENCE OF PILOT. A ship in tow of a steam-tug, and both under charge of a licensed pilot in leaving the wharf at Philadelphia, collided with another vessel through the negligence of the pilot. Held, that as under the pilotage laws, the employment of the pilot was compulsory, neither the ship nor the steam-tug nor their owners were liable. *Smith vs. The Creole*, 5 Clark, 186.

VIII. NEGLIGENCE TO AVOID SUNKEN WRECKS. Where the captain of a tug-boat knew of the existence of a sunken wreck, it was his duty, in towing a boat, to avoid coming in proximity to it, and to warn the barge in his rear of the danger from it. *McDevitt vs. Tug Paxon*, 18 Phila., 562.

IX. NEGLIGENCE TO DELIVER GOODS. The measure of damages in an action on a bill of lading for a loss in carrying goods entrusted to a boat, is the value of such goods at the port of destination. *Fox vs. Hayward*, 4 Brewster, 32.

X. NEGLIGENCE TO KEEP THE CHANNEL. The captain of a tug-boat is negligent in running so near the shore that the tow ran aground. *Cullburg vs. Tug Atlas*, 15 Phila., 450.

XI. NEGLIGENCE TO PERFORM CONTRACT. While the owners of a tow-boat may be liable for the non-performance of a contract to tow coal-boats to a certain point, the damages to be the difference in the value of the coal at the place of shipping and the port of destination, yet such owners are not liable for damages resulting from such boats while moored being struck by a raft set afloat by a sudden rise of the river, and sunk, without neglect of the defendant. *McGovern vs. Lewis*, 56 Pa., 231.

XII. NEGLIGENCE TO PROCEED TO DESTINATION. Where a contract is made by the owner of a tow-boat to convey a coal barge to a particular point, which he fails to execute, but lands the barge at another place, where it sinks and is lost, evidence that by ordinary care on the part of the owner of the barge, the boat could have been saved, is irrelevant. *Barnhill vs. Haigh*, 53 Pa., 165.

Tow-boats—Continued.

XIII. NEGLECT TO PROTECT VESSEL TOWED. When a flat-boat, when placed in the custody of a tow-boat, was in good order, but when it reached its destination was found to be broken and in a sinking condition, it is the duty of the owners of the tow-boat to show how the injury occurred, and in the absence of explanation, negligence will be presumed and damages decreed. *McLaughlin vs. The Seven Sons*, 34 Pittsburg Journal, 241.

Tow-paths.

I. NEGLECT TO REPAIR. Where water is allowed to escape through the bank of a tow-path, and to form stagnant pools on adjoining lands, held, that the canal company owning such tow-path is indictable for maintaining a nuisance. *Delaware Canal Co. vs. Comm.*, 60 Pa., 367.

Townships.

I. NEGLECT IN CREATING. Under the act of April 15, 1834, which provides for the creation of new townships, the order of court appointing the commissioners must contain an explicit direction to them to inquire into the propriety of granting the prayer of the petitioners, and a neglect to do so is fatal to the proceedings. *Plum Township, In re*, 83 Pa., 73.

II. NEGLECT TO REMOVE OBSTRUCTIONS IN A ROAD. A pair of horses and a sleigh, driven after dark, struck an ash heap negligently left on a township road. The sleigh was overturned, and the frightened horses ran off the road upon a railroad track where they were struck and killed by a train. In an action against the township for damages, held, that the negligent act of the township was the remote and not the proximate cause of the injury, and the township was not liable. *West Mahanoy Township vs. Watson*, 116 Pa., 344.

III. NEGLECT TO REPAIR ROADS. An action on the case will lie against a township for the neglect of the supervisors to keep the roads in repair. *Dean vs. Milford Township*, 5 W. & S., 545.

Trade.

I. NEGLECT IN COMBINING TO RESTRAIN. Where a number of persons engaged in the same business within the same territory, enter into an agreement to silence and stifle all competition among themselves, the agreement is in restraint of trade, and void as against public policy. *Nester vs. Brewing Co.* 161 Pa., 473.

Trading Companies.

I. NEGLECT TO FILE CERTIFICATE. Under the act of July 18, 1863, the neglect of a trading company to file a certificate makes the officers liable for debts contracted during their term of office only. *Hoopes vs. Stidham*, 13 W. N., 266.

Trade-marks.

I. NEGLECT BY INFRINGING. 1. The mere resemblance in the size and style of putting up packages is not of itself sufficient to justify the interference of a court of equity. *Brown vs. Seidel*, 153 Pa., 60. 2. A complainant is entitled to an injunction for violation of his trade-mark, if the defendant should endeavor to convey a false impression that his goods are the complainant's goods, by any means that are calculated to deceive. The injunction will be granted, where persons who buy, rather than experts, would probably be deceived by the name adopted by defendants. *Day vs. Walls*, 12 Phila., 274. *Wamsutta Mills vs. Allen*, *Idem*, 535. 3. A trade-mark, entitling the appropriator to its exclusive use, must by word, letter, sign, figure or symbol designate the true origin or ownership of the goods. The imitation need not be exact or perfect to constitute a piracy. Where a device or vignette is used, the name of the original manufacturer is not essential to make it piracy. *Dixon Crucible Co. vs. Guggenheim*, 7 Phila., 408. *Gillis vs. Hall*, *Idem*, 422. *Colton vs. Thomas*, *Idem*, 257. *Ferguson vs. Davol Mills*, *Idem*, 253. *Rowley vs. Houghton*, *Idem*, 39. 4. When a manufacturer has been in the habit of putting up his goods in a peculiar and distinctive manner, a court of equity will enjoin another person from

Trade-marks—Continued.

imitating his packages in such manner as to deceive purchasers. To constitute infringement, exact similitude is not required. All that is necessary to show is that the imitation is such that purchasers are likely to be deceived. Mere delay will not deprive the party of his remedy by injunction, although it may deprive him of his right to an account. *Hoyt vs. Hoyt*, 18 Phila., 375. *Wamsutta Mills vs. Allen*, 6 W. N., 159. *Hartell vs. Viney*, 2 W. N., 602. *Witthaus vs. Wallace*, *Idem*, 610. 5. The ownership of a trade-mark is a right of property which equity will protect from infringement, without requiring proof that its adoption or imitation by others was intentionally fraudulent, if such adoption or imitation amounted to a false representation. *Laughman's Appeal*, 128 Pa., 1.

• 6. Plaintiff's trade-mark was "The Rising Sun" stove polish, with vignette of the sun. Held, that defendants would not be restrained from using the words "Rising Moon," with vignette of the moon. *Morse vs. Worrell*, 10 Phila., 168. 7. A court of equity will not aid a plaintiff when his claim to a trade-mark is doubtful, and his conduct fairly open to criticism. *Miles Corson Co. vs. Young*, 29 W. N., 256. 8. Every man has a right to use his own name, so as not to deceive the public, or gain advantage over another. If the intent in using the name is to get such advantage, or the effect is to deceive buyers, the use of the name will be prevented. *Rogers Manuf. Co. vs. Manuf. Co.*, 16 Phila., 178.

9. To entitle the owner of a trade-mark to an injunction to prevent its use by another person, there must be in the copy such a general resemblance to the forms, words and symbols, in the original, as to mislead the public. The court will not interfere when ordinary attention will enable purchasers to discriminate. When a trade-mark is imitated so closely as to deceive the public, the parties producing such imitation will be enjoined, even though their intention be innocent. *Rowley vs. Houghton*, 2 Brewster, 303. *Colton vs. Thomas*, *Idem*, 308. *Ferguson vs. The Davol Mills*, *Idem*, 314. *Dixon Crucible Co., vs. Guggenheim*, *Idem*, 321 10. In cases involving the question

Trade-marks—Continued.

of trade-mark, the evidence must show the first appropriation of the device by the claimant, its application by him to his goods or business, and that the trade or public recognize the article or business by that device, as made or sold by him, or belonging to him. *Sheppard vs. Stuart*, 13 Phila., 117.

11. Where a party recently adopted a trade-mark which did not designate the origin or ownership, and had not become known to the trade, and another party innocently used the same trade-mark, a court of equity will not interfere. *Seltzer vs. Powell*, 8 Phila., 296. 12. A fraudulent or even accidental copy of the plaintiff's trade-mark, with merely colorable and evasible differences calculated to impose on the public, will be enjoined. *Dreydoppel vs. Young*, 14 Phila., 226. *Heins vs. Lutz*, 146 Pa., 590. *McVey vs. Brendell*, 144 Pa., 244. *Webb vs. Krause*, 5 W. N., 272. *Sheppard vs. Stuart*, 7 W. N., 498. *United States vs. Steffens, Idem*, 524. 13. The true test in case of alleged infringement of a trade-mark or label, is whether the one adopted by the defendant bears so close a resemblance to that of the plaintiff as to be likely to deceive persons of ordinary intelligence. In passing upon this question, it is the duty of the court to make personal inspection of the labels or trade-marks. To constitute an infringement, exact similitude is not required. If the imitation be such that purchasers are likely to be deceived, an injunction will be granted. *Wiers vs. Weeks' Co.*, 7 Kulp, 505.

II. NEGLECT IN ADOPTING. 1. A trade-mark is not an invention. The size or shape or mode of construction of a box, bottle or package, in which the goods are transported, cannot be protected or registered as a trade-mark. *Hoyt vs. Hoyt*, 20 Pa., 623. 2. The name of a country or section of a country cannot be appropriated as a trade-mark. *Piper vs. Laughman*, 6 Pa. County, 232.

III. NEGLECT IN APPROPRIATING. 1. The commercial name of an article which every man has a right to make and sell cannot be appropriated as a trade-mark, unless coupled with other distinctive features. *Dreydoppel vs. Young*, 1

Trade-marks—Continued.

Schuylkill Record, 322. 2. A trade-mark must be such as will identify the article, and distinguish it from others. A word, which is the name of the article, or indicates its quality, cannot be so appropriated. Everyone has the right to manufacture the same article, and to call it by its name or descriptive character. Otherwise, monopolies would be created, destructive of the freedom of trade. *Phalon vs. Wright*, 5 Phila., 464.

IV. NEGLIGENCE IN DESIGNATION. The name of a town cannot be exclusively appropriated by one person as a trade-mark, where the same kind of goods are manufactured by others in the same place. Priority of appropriating such name makes no difference. *Glendon Iron Co. vs. Uhler*, 22 *Pittsburg Journal*, 1.

V. NEGLIGENCE IN DUPLICATION OF WORD. The appropriation as a trade-mark of the word "Samaritan" in one combination of words does not prevent its being used as a trade-mark in any other combination. *Desmond's Appeal*, 103 Pa., 126.

VI. NEGLIGENCE IN IMITATING. 1. A person who has appropriated to himself a particular label, sign or trade-mark, is entitled to the protection of a court of equity which will enjoin any one who attempts to pirate upon the good-will of his customers by using such label or trade-mark without his authority. *Colladay vs. Baird*, 4 Phila., 139. 2. As a general rule, the name of a town or city cannot be appropriated for exclusive use as a trade-mark. A lawful act is not actionable, though it proceed from malicious notices. *Glendon Iron Co. vs. Uhler*, 75 Pa., 467. 3. A close imitation is evidence of fraudulent intent; it is not necessary to prove actual fraud. A party putting up his goods in a peculiar and distinctive manner is entitled to restrain another from imitating his packages. *Hoyt vs. Hoyt*, 2 Pa. County, 152. 4. While a manufacturer will be restrained from selling his own products as and for those of another, by means of a trade-mark of such other person, the mere manufacture and sale of an unpatented article, though made in precise imitation of another

Trade-marks—Continued.

manufacturer's product, will not be enjoined. *Putnam Nail Co. vs. Dulaney*, 140 Pa., 205. 5. When a person has acquired the right to use a certain symbol as a trade-mark, the imitator of it will not be protected by the mere act of adding his own name to the label. *Pratt's Appeal*, 35 **Pittsburg Journal**, 393.

VII. NEGLECT IN REPRESENTATIONS. The patentee of an alleged invention, for which his patent is invalid, cannot acquire an exclusive right in any trade-mark which would have a tendency to mislead the public, by inducing a false belief that the subject of it is protected by a patent. *Consolidated Jar Co. vs. Dorflinger*, 2 W. N., 99.

VIII. NEGLECT IN USE OF WORD OR SYMBOL. The word or symbol adopted as a trade-mark should be distinctive, and one that has not been previously used by other parties for the same device. *Barnett vs. Kent*, 8 W. N., 355.

IX. NEGLECT OF ASSIGNOR. A party having sold his right to use his own name on a preparation and having been enjoined, cannot evade the decree by the use of a different name and form of putting the article up. *Gillis vs. Hall*, 8 Phila., 231.

X. NEGLECT TO ENJOIN INFRINGEMENT. 1. Courts of equity go to great lengths in securing to tradesmen the exclusive enjoyment of trade-marks adopted and used by them, if the article be of appreciable value. It is sometimes difficult to determine whether a name given to an article is properly a trade-mark, and as such entitled to protection. A manufacturer or vendor cannot adopt words in common use, descriptive of similar articles and call upon a court to prevent other parties from using them. The name of an inventor may be employed as a part of a trade-mark. *Fulton vs. Sellers*, 4 **Brewster**, 46. 2. Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay preclude an account for past profits. *Gowans vs. Ahlborn*, 4 Kulp, 31.

XI. NEGLECT TO IDENTIFY. To constitute a valid trade-mark, it must possess sufficient individuality to indicate origin

Trade-marks—Continued.

or ownership, there must be an exclusiveness of the right to its use, it must be applicable to merchandise only, must be used in good faith in a lawful business, and its use must be continuous. *Darlington vs. Pratt*, 2 Delaware Co., 395.

XII. NEGLECT TO PROPERLY DESIGNATE. A trade-mark, adopted by a manufacturer or merchant for his goods, to be clothed with the attributes of property, must designate the true ownership or origin of the goods. *Davol Mills, In re*, 7 Phila., 253. *Dixon vs. Guggenheim, Idem*, 408. *White vs. Schlecht*, 9 W. N., 77.

XIII. NEGLECT TO PROTECT. A court of equity will not, in a contest between manufacturers of quack medicines, interfere to protect the use of trade-marks by injunction. A complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade-marks. *Fowle vs. Spear*, 4 Clark, 145.

XIV. NEGLECT TO STATE FACTS. The ground upon which equity restrains the counterfeiting of trade-marks is the promotion of honesty and fair dealing. If a trade-mark deceives as to the place of the manufacture of the goods, it is a fraud, and equity will not restrain its imitation. *Palmer vs. Harris*, 60 Pa., 156.

XV. NEGLECT TO DISCLOSE INGREDIENTS OF GOODS. A defendant in a bill to enjoin the use of a trade-mark, cannot by alleging injurious qualities in the plaintiff's goods, compel him to disclose the ingredients of which they are composed. *Tetlow vs. Savournin*, 15 Phila., 170. *Consolidated Jar Co. vs. Dorflinger*, 2 W. N., 99. *Sanger vs. Meyer, Idem*, 197.

Transcript.

I. NEGLECT IN CERTIFYING. A justice cannot certify a transcript after his term of office has expired. *Singley vs. Fisher*, 2 Schuylkill Record, 168.

II. NEGLECT IN ENTERING. 1. There is no authority under our statutes for the entry in the prothonotary office of a justice's transcript, except in that of the county where the

Transcript—Continued.

original judgment before the justice was obtained. *Bowman vs. Silvis*, 6 Kulp, 496. 1 Pa. Dist., 761. 2. A transcript of the judgment of a justice of the peace, filed in the common pleas for the purposes of lien on defendant's real estate, will be stricken off, where an appeal has been duly entered within the time limited by law. *Shugar vs. Mumford*, 1 Pa. Dist., 324. *Rubinsky vs. Patrick*, 2 Pa. Dist., 695. *Myers vs. Bort*, 13 Lancaster Bar, 200.

III. NEGLECT IN FILING. A transcript of the judgment of a justice of the peace may be filed in court after five years from the date of the rendition of the judgment, without revival before the justice. *Sanders vs. Mase*, 4 Pa. County, 134.

IV. NEGLECT IN FORM. Where, on an appeal from the judgment of an alderman, the transcript is found defective, the transcript may be filed in court, and a motion made for its correction. If one endeavors to obtain a correct transcript, it must be done before the time for filing the appeal expires. *Bell vs. Snyder*, 3 Delaware Co., 265.

V. NEGLECT OF JUSTICE TO GIVE. A magistrate is not bound in law to notice or answer letters demanding a transcript, unless the fee therefor be tendered. *Orth vs. Groff*, 4 Delaware Co., 348.

Transportation Companies.

NEGLECT TO PROVIDE SUITABLE VEHICLES. It is the duty of a transportation company to provide a vehicle in all respects adapted to the purpose of carriage, and so constructed as to encounter the ordinary risks of transportation. *Empire Transportation Company vs. Wamsutta Oil Co.*, 63 Pa., 14.

Trap-doors.

I. NEGLECT TO FASTEN. Where a trap-door on the upper floor of a factory was left open and exposed, resulting in the death of an employee, while attending to his duties, the jury

Trap-doors—Continued.

should decide the question of negligence. *Johnson vs. Bruner*, 61 Pa., 58.

II. NEGLECT TO PROTECT. The maintenance of a trap-door in the floor of a manufacturing establishment, as a necessary means of reaching the cellar, when all the employees have knowledge of its existence, is not negligence on the part of the proprietors towards their workmen, although it be without any device to keep it closed, though orders existed to close it when not in use. *Pawling vs. Hoskins*, 132 Pa., 617. *Clough vs. Hoffman*, *Idem*, 626.

III. NEGLECT TO SECURE. A shop-keeper is liable for neglect on leaving a trap-door open without any protection by which a customer was injured. *Woodruff vs. Painter*, 150 Pa., 95.

Treasure Trove.

NEGLECT OF VENDOR OF CHATTEL. A sale is a contract between parties to pass rights of property which the buyer pays or promises to pay to the seller for the thing bought or sold, and is to be controlled by the intention of the parties. The sale of a coat does not give title to valuables discovered in the pockets. The sale of an article of furniture does not give title to unknown goods concealed in a drawer. Such articles are treasure trove and enure to the benefit of the vendor. *Huthmacher vs. Harris*, 38 Pa., 491.

Treasurer.

I. NEGLECT TO PAY OVER MONEY. 1. Where the treasurer of a society was elected annually during several consecutive years, giving a bond with sureties each year, the sureties on the last bond are liable for any deficit in his final account, no matter at what period in his official life it occurred. In the absence of evidence to show that the treasurer had used the surplus funds improperly, the presumption was that they were in his hands when the last bond was given. *Beyerle vs. Hain*, 61 Pa., 226. 2. The treasurer of a corporation cannot

Treasurer—Continued.

set off his own debt, when sued for money in his hands. Without an order from the corporation, he cannot pay the funds in his hands, or appropriate them to himself. *Russell vs. Pottsville Church*, 64 Pa., 9.

Trees.

I. NEGLECT BY DESTROYING. Where a party has planted trees upon a sidewalk, he has a property right to them, and may sustain an action against a neighbor or stranger for the wanton destruction of the trees. *Huling vs. Henderson*, 161 Pa., 553.

Trespass.

I. NEGLECT OF THE PARTY TRESPASSED UPON. The property of a trespasser cannot be injured or destroyed without liability for the consequences. It is no excuse for the defendant's negligence, that the plaintiff's property was placed where it received the injury, by an act of trespass on the part of the plaintiff. *Brown vs. Lynn*, 31 Pa., 510.

II. NEGLECT TO NOTICE. A plaintiff is bound to take notice of a trespass of which he might readily have known, unless his vigilance be relaxed or diverted by the actual fraud of the defendant. *Scranton Gas Co. vs. Iron Co.*, 167 Pa., 136.

III. NEGLECT TO WARN TRESPASSERS. Culpable negligence is the omission to do that which a reasonable, prudent and honest man would do ; or doing that which such a man would not do in the circumstances of the particular case. If an owner has allowed persons the use of his property, tending to produce a belief that it will not be objected to, and therefore to act on the belief, he should warn them of his intention to recall his permission. Notice is required to a man who acts *bona fide*, not to him who wilfully uses that to which he pretends no title. Persons who use their property so as to hold forth an invitation to enter, give license to do so, as innkeepers, merchants, etc. Trespass will become right by sufferance and lapse of time. *Kay vs. Penna. R. R.*, 65 Pa., 269.

Trespass.

I. NEGLECT OF RIGHTS. Even a trespasser has a right of action against the owner of grounds for personal harm occasioned by a spring gun or other dangerous object set on the premises without warning to intruders. The owner cannot shoot or set a ferocious dog upon a mere trespasser. Yet such owner is not liable to a trespasser or to one who enters by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance if it were on a public street, where all persons had a legal right to be. *Gillis vs. Penna. R. R.*, 59 Pa., 141. 1 *Pittsburg Journal*, 5.

II. NEGLECT NO PROTECT. 1. A trespasser upon a railway train cannot be ejected therefrom without a reasonable regard for his safety. *Arnold vs. R. R.*, 115 Pa., 140. 2. A street railway company in ejecting a trespasser from a car, owe him such care as to avoid endangering his life and limb. *Biddle vs. Ry. Co.*, 112 Pa., 551. 3. A railroad company built a barbed wire fence to prevent persons from using a path across the track. A trespasser, in continuing to use the path, was injured. Held, that he assumed all risks that might possibly occur from his negligent act. *Comly vs. R. R.*, 22 W. N., 42. 4. A railroad company owes no duty to a trespasser riding on a train. The conductor of a train permitted a lad of fifteen to ride daily to sell newspapers. This was against the rules of the company. After five months, the boy was killed on the train in an accident, caused by the alleged negligence of the company. In an action by the boy's mother for damages, held, that the boy was a mere trespasser, to whom the company owed no duty, and the plaintiff could not recover. *Duff vs. R. R.*, 9 W. N., 504. 5. To enable a trespasser to recover for an injury against the owner of the property he was trespassing upon, he must do more than show negligence; it must appear that there was a wanton or intentional injury inflicted on him by the property owner. A child of tender years may be a trespasser, and be subject to the consequences of his trespass. *Rodgers vs. Lees*, 140 Pa., 475. *Gillespie vs. McGowan*, 100 Pa., 144. 30 *Pittsburg Journal*, 51. *Gillis vs. R. R.*, 59 Pa., 129.

Trespass—Continued.

6. Where the owner of land, in the exercise of his dominion, makes an excavation thereon, which is such a distance from the public highway that the person falling into it would be a trespasser upon the land before reaching it, the owner is not liable for an injury thus sustained. Yet even a trespasser may have redress for injuries inflicted upon him. Though he is liable to an action for his own wrong, he does not necessarily forfeit his right of action for injuries he has sustained, as, for example, by falling into a hole newly excavated on a defendant's premises adjoining a public way. The owner of open land has no right to plant in it spring-guns by which ordinary trespassers may be wounded. No one has right to place on his land any instruments to injure persons merely straying on such land. *Gramlich vs. Wurst*, 86 Pa., 74. 7. Where no duty is owed, no liability arises. If a party leaves an open pit in his private yard to which others have not access, and a person strays in without invitation, or comes in without right, and falls into the pit, he can have no action against the owner of the yard for the alleged negligence. He had no business there, and the owner owed him no duty. But duties sometimes arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury. *Hydraulic Works vs. Orr*, 83 Pa., 335. 8. When there has been failure on the part of owners of real estate to enclose excavations, it would seem that negligence can only properly be charged, in case of an injury resulting from such failure, where the person injured was invited upon the premises by the owner or his agent, or was working there for the owner, or when the excavation was so near a highway as to involve probable peril to a traveler on such highway. Trespassers on the grounds of such owner have no claim for damages for injury received by falling into such excavation. *Huffman vs. Musgrove*, 16 W. N., 270. 9. A trespasser on the land of another can recover for wanton or intentional injury inflicted on him by the owner, where said

Trespass—Continued.

trespasser is not guilty of contributory negligence. *Huey vs. Smith*, 26 Pittsburg Journal, 181. 10. A boy, ten years of age, walking along a railroad, not at a public crossing, was injured by being struck by an empty and unattached car; being a mere trespasser, he was held as not entitled to damages therefor. *Mitchell vs. R. R.*, 132 Pa., 226.

Trial

I. NEGLECT OF FORMAL ISSUE. In Pennsylvania, if parties go to trial without formal issue, it is an agreement to waive matters of form and to try on the merits. *Lewisburg R. R. vs. Stees*, 77 Pa., 332.

II. NEGLECT OF PLAINTIFF TO APPEAR. When a case is called for trial in the common pleas court, and the plaintiff does not appear in person or by counsel, and no testimony is taken, the proper practice is to enter a nonsuit, instead of rendering a verdict for the defendant. *Sutherland vs. Ross*, 9 Montgomery Co., 114.

III. NEGLECT ON THE PART OF COUNSEL. Where counsel, in their arguments to the jury, make statements of prejudicial matters which are not in evidence, it will afford ground for a new trial. *Comm. vs. Bruner*, 1 Pa. Dist., 641.

IV. NEGLECT TO ATTEND. The mistake of defendant's attorney, as to the date of the trial and his non-receipt of notice thereof, may be ground for the court to open judgment. *Jackson vs. Van Horn*, 1 D., 241.

V. NEGLECT TO ASK CONTINUANCE. It is too late to move for a continuance, after a juror has been sworn. *Coleman vs. Hess*, 1 Browne, 240.

VI. NEGLECT TO DEFEND. 1. The defendant's counsel had been dead for many years before the case was moved for trial. Defendant knew the fact, but employed no other counsel, and did not attend to the matter. Held, that he was guilty of negligence, and the verdict taken in his absence should stand. *Cowperthwaite vs. Lee*, 5 Kulp, 409. 2. Every person is bound to take care of his own rights, and to vindicate

Trial—Continued.

them in due season. Accordingly, if a defendant, having the means of defence in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded. Want of diligence will prevent a defendant from obtaining a postponement of the trial. *Walton vs. Robb*, 1 Ashmead, 44. *Comm. vs. Gross, Idem*, 281.

VII. NEGLECT TO GRANT. Where a case has been tried on its merits and a verdict and judgment entered for plaintiff, and afterwards on error the judgment is reversed, but no *venire facias de novo* is awarded, the judgment of reversal constitutes no bar to another suit for the same cause of action. *Fries vs. R. R.*, 98 Pa., 142.

VIII. NEGLECT TO GRANT CONTINUANCE. 1. A case cannot be continued for the absence of a witness, unless the court be satisfied the witness is material, that there has been no neglect, and that the witness can be had at the time to which the trial is deferred. *Comm. vs. Winnemore*, 1 Brewster, 356. 2. Counsel asking for the continuance of a case on the trial list, on presentation of a doctor's certificate of the illness of a material witness, must state what is to be proved by the witness, so that if the other side admits that the witness would testify to such facts if examined and accepts it as evidence, the case may go on to trial. *Heise vs. R. R.*, 11 Lancaster Review, 31. 3. A case will not be continued on account of the absence of the plaintiff, a material witness, where opportunity has been had to take his deposition. *Smith vs. Cunningham*, 9 Phila., 96. *Harris vs. Govett*, 3 W. N., 560.

IX. NEGLECT TO REQUEST. After a master has found a fact, it is too late to ask for a jury trial. *Lower's Appeal*, 1 Walker, 404.

Trover.

I. NEGLECT IN INSTITUTING ACTION. There is a material difference between trespass and trover. Trover waives the trespass in taking, admits the possession to have been lawfully.

Trover—Continued.

gotten, and proceeds to recover damages only for the unlawful conversion. *Hall vs. Moor*, Addison's Rep., 378.

II. NEGLIGENCE OF DEMAND. 1. When property is taken from a party in disregard of his claim of ownership, by another who claims the property as his own, and an action of trover is afterwards brought in such case, a formal demand and refusal need not be proved by the plaintiff. *Springer vs. Groom*, 21 W. N., 242. 2. In the absence of an actual conversion, a demand and refusal must be proved to maintain the action of trover against a defendant who came lawfully into possession of the goods. But where the possession itself was obtained by force or fraud, a demand is not necessary. The wrongful act of the party is the evidence of his intention to convert. *Yeager vs. Wallace*, 57 Pa., 368.

Trustees.

I. NEGLIGENCE, RESULTING IN LOSS. 1. When it is sought to charge a fiduciary with moneys lost by him or through his negligence, the measure of diligence and care is precisely that which a man of ordinary prudence would practice in the care of his own estate; and in the absence of gross misconduct or gross neglect, a trustee will not be surcharged with moneys which never came into his hands. *Lancaster's Estate*, 18 Phila., 10. *Hinkle's Estate*, *Idem*, 216. 2. It is the harshest demand that can be made in equity to compel trustees to make up a deficiency, not owing to their wilful default. *Johnson's Appeal*, 12 S. & R., 324. 3. A trustee is answerable in equity, and consequently in conscience, only for negligence, without which he is not bound to make good a loss suffered by the *cestui que trust*. *McPherson vs. Rees*, 2 P. & W., 523.

II. NEGLIGENCE BY CONTINUING THE BUSINESS OF A PARTNER. Where a trustee under a will and as surviving partner continues a business, he is bound to exercise only ordinary skill, care and caution in the conduct of the business. *Allen's Estate*, 9 Pa. County, 329.

III. NEGLIGENCE BY DEFAULTING. A *cestui que trust* has a

Trustees—Continued.

legal right to an attachment against a defaulting trustee, although the trustee may be insolvent. *Wilvert's Estate*, 16 Pa. County, 398.

IV. NEGLECT BY ERROR OF JUDGMENT. For a mere error of judgment, a trustee will never be surcharged with moneys which have not come into his hands. *Hinkle's Estate*, 4 Pa. County, 2. *Hurley's Estate*, 5 *Idem*, 574.

V. NEGLECT BY SHOWING PREFERENCES. A trustee cannot lend himself to any arrangement whereby the interests of one class of his *cestui que trustent* are sacrificed to another class. He cannot favor the one at the expense of the other. *Henninger vs. Boyer*, 10 Pa. County, 519.

VI. NEGLECT IN ACCEPTING BONUS. A trustee will not be allowed to make any profit for himself out of the trust estate, therefore he must account for all sums received by him in the way of bonus or commission on money loaned. *Keen's Estate*, 16 Phila., 208, 261.

VII. NEGLECT IN ACCOUNTS : KEEPING, FILING, SETTLING.
1. The first duty of trustees is to be constantly ready with their accounts. All doubts and obscurities are to be taken adversely to them. Loss arising from default in this respect must be borne by the trustees, unless the *cestuis que trustent* with knowledge have acquiesced. *Bockius' Estate*, 20 Phila., 154. 2. Where exceptions are filed to a trustee's account, some of which are sustained, the costs of the audit, as a general rule, will be divided. *Graham's Estate*, 1 Chester Co., 301. 3. The duty of a trustee to keep regular and correct accounts, is imperative. If he does not, every presumption of fact is against him. He cannot impose upon his *cestui que trust* the obligation to prove he has actually received all he might have received. *Landis vs. Scott*, 32 Pa., 498. 4. An accountant who has not kept the money of a trust estate separate from his own, is properly charged with interest on the balance in his hands. His commissions will be reduced, where such accountant has kept no fair account and lacked care in preserving and producing vouchers. *Wistar's Appeal*, 54 Pa., 60.

Trustees—Continued.

5. A surviving trustee should file a separate account, and the executor of a deceased trustee should not be joined. *Jackson's Estate*, 16 W. N., 50. 6. As a rule, a trustee who, with integrity, accounts for all assets of his trust, has fairly earned his compensation. He is not to be deprived of it by a delay or neglect to file an account for a series of years, or from his book of entries being faulty. *Miller's Estate*, 17 Phila., 433. 7. When a trustee fails to file an account until compelled to do so, and claims large credits which are greatly reduced by the court, the costs of litigation may properly be imposed upon him. *Taylor's Appeal*, 21 W. N., 356. 8. An action does not lie by a creditor against trustees under a domestic attachment, until they have been called before the court which appointed them, to settle their accounts. *Wilhelm vs. Miley*, 5 S. & R., 137. 9. Failure to file an account for thirteen years is not sufficient to deprive a trustee of his commissions. *Myers' Estate*, 6 York Record, 99. 10. Settlements between a trustee and his *cestui que trust* are narrowly watched in a court of equity, and where there is the least suspicion of unfairness, they will not relieve the trustee from accounting. *Schoch's Appeal*, 33 Pa., 351. 11. Releases from *cestuis que trustent* to their trustees, without the settlement of their account, are looked upon in law with jealousy, but over-reaching, mistake or fraud must be shown to set such releases aside. *Shartel's Appeal*, 64 Pa., 25.

VIII. NEGLIGENCE IN APPOINTMENT. Where the person named in a petition for the appointment of a trustee is objected to by others in interest, and there has been protracted litigation between the parties, the orphans' court will appoint a trustee not allied to any of the parties, and wholly uninterested. *Gaul's Estate*, 12 Phila., 13.

IX. NEGLIGENCE IN CONDUCTING LITIGATION. Trustees who conduct litigation in the interest of some of their *cestuis que trustent*, and in hostility to others, are not entitled to credit for the costs of such litigation as against the latter. *Warner's Estate*, 34 Pittsburg Journal, 431.

Trustees—Continued.

X. NEGLECT IN CONVERSION OF TRUST FUNDS. 1. If money has been converted by a trustee into a chose in action, although the legal right has been changed, equity regards the beneficial ownership. Equity will follow a fund through varied transmutations and preserve it for the owner so long as it can be identified. *Farmers' & Mech. Bank vs. King*, 57 Pa., 202. 2. Whenever a trust fund has been wrongfully converted with another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner or *cestui que trust*. If a trustee misapply trust funds, the *cestui qui trust* will have an election, either to take the security or other property in which the funds were wrongfully invested, or to demand repayment from the trustee of the original fund. *Potter vs. Hoppin*, 10 Phila., 399.

XI. NEGLECT IN CONVEYING TRUST PROPERTY. In the absence of fraud, a trustee is liable with respect to property which he conveys to a volunteer, to the same extent as for that which he sells to a purchaser with notice of the trust; the liability is measured by the market value of the land at the date of the conveyance. *Dilworth's Appeal*, 108 Pa., 92.

XII. NEGLECT IN DEPOSITING TRUST FUNDS. 1. If a trustee invest trust funds with a private banker without an order of court, but in good faith under advice of counsel, he must suffer a loss resulting from the insolvency of the banker, even though the latter was in undoubted credit at the time of the loan. *Baer's Appeal*, 127 Pa., 360. 2. A trustee, who deposits trust funds in his own name in a bank, which fails, is personally liable for the loss. *Comm. vs. McAllister*, 28 Pa., 480. *McAllister vs. Comm.* 30 Pa., 536. 3. A trustee will not be held liable where, in the ordinary discharge of his duties, he deposits assets temporarily in a bank of good repute, though the bank afterwards fail; but the deposit must be in the name of the trust itself. *Law's Estate*, 144 Pa., 500. 4. Where a trustee deposits trust moneys in a bank of good repute, he is not responsible for the loss of such moneys owing

Trustees—Continued.

to the subsequent insolvency of the bank. *Union Reformed Congregation vs. Strauch*, 1 Schuylkill Record, 313.

XIII. NEGLIGENCE IN DISTRIBUTION. Interest may be charged against an accountant, if the distribution be delayed by reason of groundless exceptions filed by him alone. An accountant is not chargeable with the expenses of the audit, but as a rule they should be charged to the estate. *Yoder's Appeal*, 45 Pa., 394.

XIV. NEGLIGENCE IN DIVERTING TRUST FUNDS. A trustee of a fund for a married woman, who has the power of appointment of the *corpus* of the estate by will, will not be surcharged with funds diverted from the trust at her request, upon the application of the *cestui que trust*. Parties having a contingent interest in the estate upon the failure of appointment by such married woman, may ask for a surcharge in case of such failure. *Cooper's Estate*, 30 W. N., 285.

XV. NEGLIGENCE IN FOSTERING PERSONAL INTERESTS. It is an accepted principle, that a trustee is not at liberty to act or contract for his own benefit in regard to the subject of the trust, and that the advantage of all that he does about the trust property shall accrue to the *cestui que trust*, if the latter desire it. A trustee must not acquire rights in the subject antagonistic to the party he represents. *Wood vs. Irwin*, 9 Montgomery Co., 75.

XVI. NEGLIGENCE IN INSTITUTING SUITS. Trustees are not individually liable for costs in suits brought by them. *Winpenny vs. Winpenny*, 8 W. N., 390.

XVII. NEGLIGENCE IN INVESTING FUNDS. 1. Trustees having in their hands money for distribution, and deposit the same in a bank of fair repute, in good faith, pending the confirmation of their account, are not responsible for a loss resulting from an unexpected failure of the bank. Where trustees have money in their hands to remain for some time, it is their duty to invest it. *Breneman vs. Mylin*, 2 Pa. Dist., 296. 2. It is the duty of a trustee to invest the fund safely, so as to make it productive; and, neglecting to do so, he is chargeable

Trustees—Continued.

with interest. *Breneman vs. Frank*, 28 Pa., 475. 3. A trustee investing in mortgages, without submitting the same to the approval of the court, will be held to the highest degree of care. Where the trustee is guilty of supine negligence he will be discharged. *Barton's Estate*, 11 W. N., 561. 4. If a trustee makes investments not warranted by the instrument creating the trust, he does so at his own risk, and may, if loss ensue, be charged therewith. *Conyngham's Estate*, 25 Pittsburgh Journal, 23. 9 Lancaster Bar, 57. 5. A trustee directed by will to make such instrument as will be acceptable to those entitled thereto, will not be surcharged with a loss occurring through depreciation of an instrument considered good at the time, and not objected to by any of the *cestuis que trustent*, in the absence of supineness, carelessness and neglect on the part of the trustee. *Dorsey's Estate*, 29 W. N., 416. 6. Where the will directs accumulated income to be invested, the trustee will be surcharged with interest upon the balance which he has suffered to remain idle beyond a reasonable sum for contingencies; but, unless he is guilty of something more than mere inaction, his commissions will not be disallowed. *Dugan's Estate*, 18 Phila., 88. 18 W. N., 397. It becomes the duty of every co-trustee to see that money collected by his colleague should be properly reinvested. If he neglects this duty for a long period of time, he is responsible for the embezzlement of the fund by his co-trustee. *Fesmire's Estate*, 134 Pa., 67. 8. The estate of a trustee will be held liable for the loss incurred by him in investing the trust estate in securities not authorized by law. *Gaw's Estate*, 24 Pittsburgh Journal, 128. 12 Phila., 4. 9. A higher degree of caution is expected of a trustee in investing moneys in his hands, than in keeping the trust fund in the form in which it originally came into his possession. Investments made in what are termed bonus mortgages are clearly too speculative, and the trustee will be held liable for losses thereby occasioned. *Girard Life Co.'s Appeal*, 30 Pittsburgh Journal, 344. 10. Whether interest is chargeable to a trustee depends upon whether he has had in

Trustees—Continued.

his hands money he should have invested, or which he has himself used. A reasonable time is always allowed a trustee to make investments, and he should be charged interest only upon balances of cash unnecessarily kept on hand. He is not chargeable with interest on small balances, which cannot readily be invested. *Griffith's Estate*, 147 Pa., 281. 11. A trustee who invests a small trust fund with his own money on loan at four and one-half per cent. is not chargeable with a greater rate of interest, where it appears that the rate of investment was common, and all that could be safely had in the neighborhood. *Graver's Appeal*, 50 Pa., 189. 12. What are termed "bonus mortgages" on properties of uncertain market value are not proper security for the investment of trust funds. The trustee is guilty of supine negligence in so investing, and where the interest is not paid on them he will be surcharged. *Girard Trust Co.'s Appeal*, 13 W. N., 367. 13. It is the duty of one holding trust funds to keep them employed and make them productive. One failing to do so, will be surcharged with interest upon the settlement of his account. *How-er's Appeal*, 22 W. N., 536. 14. A trustee may invest trust moneys without applying to the court for authority, and if he exercise common skill, caution and prudence in making the investment on real estate on other securities authorized by law, he is generally not liable for any loss which may arise. *Huey's Estate*, 1 Chester Co., 170. 15. A trustee, in making investments, can protect himself from risk only by investing the trust fund in real or government securities, or by making an investment in pursuance of an order of court. A loss of trust money, invested on personal security, must be borne by the trustee. *Hemphili's Appeal*, 18 Pa., 303. 16. Where a trustee is directed by will to invest a fund in securities, he must implicitly comply with his instructions, or make the investment under the direction of the orphans' court in the securities prescribed by statute; otherwise he must account for the principal invested, with interest. An investment of the trust fund in stocks, in which

Trustees—Continued.

he had at the same time invested his own means, will not exempt him from liability for losses thereby incurred. *Ihm-sen's Appeal*, 43 Pa., 431. 17. It is certainly misleading to say, that a trustee is safe so long as he exercises over his trust the same care which an ordinary prudent man of business bestows on his own capital. The latter may, with prudence, engage in a multitude of enterprises which are forbidden to the former; he may loan his money on call, he may purchase stock in corporations, whose future success is a problem, or he may invest in junior encumbrances. If a trustee should so use his fiduciary funds, he would in most cases be liable to be accused of bad faith. The law has named certain classes of securities as legal receptacles for trust moneys. But it allows trustees a generous discretion, and pardons mere errors of judgment, even where they result in disaster. *Jackson's Estate*, 16 W. N., 20. 18. If a trustee, owing to the pendency of legal proceedings, is prevented from paying over the moneys in his hands, it is his duty to invest the fund, and, in default, he is chargeable with interest. *Landis vs. Scott*, 32 Pa., 495. 19. Where a trustee desires to make a loan upon a second lien, his proper course is to petition the orphans' court for authority to make the same. *Lechler's Appeal*, 21 W. N., 505. 20. The trustee of money is bound to keep the fund and its increase invested, but is entitled to keep in hand, out of the income, a moderate sum, to meet the demands of the *cestui que trust*, as also to a reasonable time after the receipt of the money, to invest it; and he can only be surcharged with interest upon any balances uninvested beyond such time. *Lukens' Appeal*, 47 Pa., 356. 21. Where the will, creating the trust, made it the duty of the trustee to invest the surplus of unexpended income, the trustee will be surcharged with interest on the amount, though so small as to make investment difficult. *McCauseland's Appeal*, 38 Pa., 466. 22. As a general principle, it is true that a trustee cannot call in money invested on good real security, where no risk is apparent. *Naglee's Estate*, 6 Phila., 28. 23. When a trustee has

Trustees—Continued.

exercised ordinary prudence and good faith in making an investment in a statutory security, he will not be liable for loss arising from depreciation in the value of such security, although the investment was made without previous authority of court. *Noble's Estate*, 33 Pittsburg Journal, 163. 24. The legislature has wisely suggested certain securities in which trustees may, without risk to themselves, make investments of trust funds under the direction of courts. Outside of these designated securities, they invest at their own risk. *Oliver's Estate*, 30 Pittsburg Journal, 385. 25. Where a trustee invested trust funds in a junior judgment, and never demanded interest thereon, but revived the judgment from time to time without adding interest, until by the deterioration of the property the judgment became valueless, the trustee was held guilty of gross negligence. *Old's Estate*, 8 Lancaster Review, 329. 26. In the absence of fraud or wilful misconduct in making investments, a trustee will not be punished by being deprived of his commissions, even though he may, as the consequence of his negligence or mistake, be surcharged with a loss. *Page's Estate*, 18 W. N., 456. 27. The court will not direct a trustee to invest the trust funds, at the instance of the *cestui que trust*, in real estate in another state. *Pownall's Estate*, 2 Lancaster Bar, No. 47. 28. Where trust money cannot be applied in a short period to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust* by investment of it in some proper security. Our act of assembly authorizes investments in certain public loans, or on real securities, which, when made under an order of the orphans' court, exempt the trustee from all liability of loss for the same. Such trustee, even with plenary powers under the terms of a will, is not justified in investing in the stock of a manufacturing company, the works of which are unfinished, even though the *cestui que trust*, a married woman, sanctioned it. *Pray's Appeal*, 34 Pa., 100. 29. A trustee, exercising ordinary prudence in investments, will be protected when, in good faith, he has acted

Trustees—Continued.

under advice of counsel, but such protection can extend only to matters falling properly within the scope of professional advice. *Smith's Estate*, 13 Phila., 309. 30. Even if a will fails in terms to direct a trustee to invest trust funds, the duty to do so arises from necessary implication from an order to pay over interest. How could interest be earned or paid over without an investment of the principal? A neglect to invest would render a trustee liable to a surcharge in his accounts. Where a trustee is directed to pay over the interest, he has no right to pay over any portion of the *corpus* of the estate to his *cestui que trust*. The law does not deal harshly with trustees; but when they unlawfully part with the trust funds committed to their care, they cannot justly complain if they are held responsible. *Stambaugh's Estate*, 135 Pa., 596. 31. A trustee is liable for interest on moneys received by him, which he neither invested nor paid over in compliance with the duties of his trust. He cannot claim compensation for services self-imposed, and resulting from his own wrong. *Stearly's Appeal*, 38 Pa., 525. 32. In all cases where any corporation shall be appointed trustee or guardian by the orphans' court, it shall be upon condition that such corporation shall not invest any of the trust funds in coupon bonds, or other securities that pass by delivery. Such corporation must invest all trust funds in its name as trustee, and keep the same separate and apart. *Trust Company, In re*, 7 Phila., 517. 33. Commissions will be disallowed to a trustee, who not only fails to invest the principal of the estate, but uses it in his business, notwithstanding the transaction results in benefit to the estate. Only an extreme case will justify the surcharge of compound interest upon a trustee who has neglected to invest. *Waylan's Estate*, 18 Phila., 21. 17 W. N., 375. 34. It is supine negligence for a trustee to permit a trust fund of nearly \$3000 to remain on deposit in a savings fund for fifteen years. The fact that the *cestui que trust* was not dependent upon the income of the fund for her living, is no excuse for the trustee not to bestow the same care and effort to seek a

Trustees—Continued.

well-secured investment as he probably would have bestowed upon his own property. Even if counsel advised him that he had a right to continue the deposit, such advice will not justify a man in abandoning his own common sense. *Whitecar's Estate*, 28 W. N., 575. 35. Trustees, in this state, are not liable beyond what they actually receive, except in cases of gross negligence, and are not responsible when, observing statutory provisions as to investments, they deal with moneys entrusted to them in good faith, as men of ordinary prudence and sagacity deal with their own property. It is the harshest demand that can be made in equity, to compel trustees to make up a deficiency not owing to their wilful default. A trustee is called upon to exert precisely the same care, and no more, in behalf of his *cestui que trust*, as he would do for himself. He is allowed reasonable time for the investment of trust funds. *Wimer's Appeal*, 87 Pa., 120. 36. An investment by a trustee in the stock of an incorporated company, cannot be made of trust funds with which no hazard can be permitted. This is not the case, where the trustee is authorized to do so by the deed of trust. *Worrell's Appeal*, 23 Pa., 48. 9 Pa., 508.

XVIII. NEGLECT IN LOANING TRUST FUNDS. 1. A trustee is responsible for a loss arising from his loan of trust funds upon personal security, An apparent exception exists when he loans or deposits them for safe-keeping in a bank. An agreement to give two weeks' notice to the bank before drawing any of the funds in consideration of interest paid, constitutes an investment and makes the trustee liable in case the bank becomes insolvent. *Lair's Estate*, 27 W. N., 345. 2. The rule in equity is well-settled, that if a trustee commits a breach of trust by loaning the assets of the trust to a third person, that individual is bound to indemnify the trustee, and if he has the trust property in specie he will be obliged by a court of equity to restore it to the trustee from whom he borrowed it. *Abbott vs. Reeves*, 49 Pa., 494.

XIX. NEGLECT IN MAKING PROFIT FROM TRUST PROPERTY. 1. The general principle of equity is, that a trustee

Trustees—Continued.

will not be permitted to make any profit for himself out of the trust property, or to acquire therein an interest adverse to that of the *cestui que trust*. *McElwee vs. Rourke*, 18 Phila., 314. 2. A trustee is not at liberty to act or contract for himself, or for his own benefit, in regard to the subject of the trust. Any advantage to the trust property shall accrue to the *cestui que trust*, if the latter desire it; any interest hostile to the *cestui que trust* is repugnant to the relation which the trustee has assumed. A man entrusted to manage for others, undertakes when he becomes a trustee not to manage for himself. *Miller's Appeal*, 30 Pa., 493.

XX. NEGLIGENCE IN MANAGEMENT. 1. A trustee who, in the management of trust funds, acts unfaithfully and dishonestly, will not be allowed compensation. *Swartswalter's Account*, 4 W., 77. 2. Incompetency is as good ground for the removal of a trustee as gross negligence or dishonesty. *Drum's Estate*, 15 Phila., 510.

XXI. NEGLIGENCE IN MINGLING TRUST FUNDS. 1. As long as trust funds can be identified, they will be preserved for the owners. Equity will follow a trust fund through any number of transmutations, and preserve it for the owner if it can be identified. *Cox's Estate*, 5 W. N., 474. 2. Where there has been an admixture of trust and individual funds by a trustee, his commissions will usually be forfeited, and he will be charged with interest on the sum in his hands up to the date of the adjudication. *Ashton's Estate*, 18 W. N., 102. *Williamson's Estate*, *Idem*, 138.

XXII. NEGLIGENCE IN OBTAINING ANOTHER'S PROPERTY BY FRAUD. As a general proposition, whenever a person has obtained the property of another by fraud, he is a trustee *ex maleficio* for the person so defrauded. Equity will not permit him to enjoy the fruits of his fraud, but will hold him to be but a trustee for the rightful owner. He is not trustee for the title, but of the thing. *Christy vs. Sill*, 95 Pa., 386.

XXIII. NEGLIGENCE IN PAYMENTS. 1. A mistaken payment by a trustee, without authority, to the wrong person, in full

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belief that it was made to the right claimant, cannot discharge the trustee's liability to account to the rightful party. *Fidelity Trust Co. vs. Norris* 17 Phila., 259. 14 W. N., 225. 2. A trustee can claim no credit, except for the amount he has actually disbursed in payment of claims against the estate, whether done with his own funds or the funds of the estate. *Hermstead's Appeal*, 60 Pa., 423. 3. When a trustee breaks into the principal of an estate, under circumstances that would induce a chancellor to make a previous decree for maintenance out of the principal, the court will allow him in the settlement of his accounts credit for such expenditures, as if a previous order had been made. If a trustee neglect to execute the duties of his trust, under the pretext of avoiding responsibility, the court will dismiss him. *Potts, In re*, 1 Ashmead, 340.

XXIV. NEGLECT IN PURCHASE OF TRUST PROPERTY. 1. If a trustee to sell the property of an insolvent corporation, becomes the purchaser, the purchase is generally voidable, but the *cestui que trust* must move in a reasonable time. *Ashhurst's Appeal*, 60 Pa., 290. 2. A purchase by a trustee at his own sale is not void, but voidable only, and capable of being confirmed by the beneficial owner. The trustee should make previous application for leave to bid. A trustee will not be punished for mere error of judgment, even if the error be made manifest. *Bunting's Estate*, 19 Phila., 101. *Hurley's Estate, Idem*, 102. 3. The rule which forbids a purchase by a trustee at his own sale, is founded upon reasons of public policy, and is independent of integrity of motive, honesty of sale, or inadequacy of price. *Bunting's Estate*, 23 W. N., 159. 4. Where a trustee purchases property of his trust, it is at the option of the *cestui que trust* to treat the purchase as a nullity, though conceded to have been fairly made, and for a full price. Such sale is therefore voidable, and not void. If the property be again offered for sale, it will be at the price the trustee gave, together with the amount of his *bona fide* and substantial improvements. *Beeson vs. Becson*, 9 Pa., 282. *Cadbury vs. Duval*, 10 Pa., 272. 5. Such purchase may be

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authorized in advance by leave of court, or it may be confirmed by the *cestui que trust*. *Bunting's Estate*, 5 Pa. County, 623.

6. Where a trustee, at his own sale, under order of court, purchases lands of the trust estate, using practically the trust funds for that purpose, the profits made on a resale belong to his *cestui que trust*, even though the order of sale allowed the trustee to become a bidder. A trustee will not be allowed to make a profit out of the trust fund; whatever profit arises therefrom belongs to the owner of the fund, and not to its custodian. *Baker's Appeal*, 120 Pa., 33.

7. Where a trustee, by decree of the court, is allowed to bid at his own sale of trust property to protect his beneficial interest therein, he must act within the strictest line of his responsibility. His character as a bidder cannot be permitted to derogate from his duty as a trustee. *Cadwalader's Appeal*, 64 Pa., 293. *Dundas' Appeal, Idem*, 325.

8. When the trustee himself becomes the purchaser of the trust estate, the *cestui que trust* may set aside the purchase. This principle extends to judicial officers, and to all other persons who have a concern in the disposition and sale of the property of others, whether the sale be public or private, judicial or otherwise. Even if a *bona fide* price be paid, the *cestui que trust* may avoid the sale. To permit a trustee to bid, would be applying the information acquired by the trust to his own benefit. It is not necessary to show that the trustee has received advantage by the purchase. *Campbell vs. Penna. Ins. Co.*, 2 Wh., 63.

9. The doctrine is indisputable, that a party will not be allowed to purchase and hold property for his own use, if he stands in a fiduciary relation to it, if contested by the *cestui que trust*. But this rule does not apply if the sale be made under adverse proceedings by a public officer, and the trustee has not the means to prevent the sale. *Chorpenning's Appeal*, 32 Pa., 315.

10. The validity of a purchase of the trust property by a trustee can only be questioned by the *cestui que trust*. Such a purchase is voidable only. *Dundas' Estate*, 17 Phila., 491.

11. A trustee can never be a purchaser of the property

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embraced under the trusts, without the assent of all the persons interested. This extends to judicial sales as well as private. *Everhart vs. Searle*, 71 Pa., 260. 12. The doctrine that a trustee may not acquire an interest prejudicial to, or in conflict with, the interest of his *cestui que trust*, is a rule of public policy necessary to preserve honesty and fidelity in the administration of trusts. *Fisher's Appeal*, 34 Pa., 31. 13. Where a trustee purchases trust property in his own name, and it enhanced in value thereafter, a court of equity will decree that the profits shall enure to the benefit of the *cestui que trust*. *Frank's Appeal*, 59 Pa., 19. 14. The disability of a trustee to acquire title in trust property at his own sale against his *cestui que trust*, has become a maxim in equity jurisprudence. *Hauck's Estate*, 37 Pittsburg Journal, 9. 15. Where a trustee has been surcharged with the amount of a ground rent, which he purchased from himself for his *cestui que trust*, the court should see that the ground rent is reconveyed to him. In the present case, the trustee was deprived of commissions and made to pay the costs. *Harris vs. Sheldon*, 1 Monaghan, 188. 16. A trustee should never be permitted to raise an interest in himself opposite to that of his *cestui que trust*; and it is on this ground that it has always been held, that a trustee or his agent shall not become the purchaser of that which he holds in trust. *Heager, In re*, 15 S. & R., 66. 17. No principle is better settled, than that no trustee can become a purchaser at his own sale, or acquire an interest in the trust estate without the consent of those for whose benefit he has undertaken to act, or of the court having jurisdiction of the trust. In four cases a person acting in a fiduciary relation may purchase: (1) Where two or more trustees sell the trust estate openly and fairly, and a stranger purchase for one of them at full price, such sale is not necessarily void. (2) A trustee may buy the trust property when the sale is made by a public officer under proceedings adverse to the interest of the *cestui que trust*, and the trustee has not the means or power to prevent the sale. (3) When the trust

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property is taken from the trustee by act of the law. (4) When the court having jurisdiction of the trust authorizes the trustee to become the purchaser, and he fulfils all the conditions of the decree of the court in relation thereto. *Hallman's Estate*, 13 Phila., 563. *Bowker's Estate*, 5 W. N., 493. *Lardner's Estate*, 6 W. N., 51. 18. A trustee who purchases trust property at his own sale, or procures another to purchase for him at such sale, holds it subject to the original trust. *Herr's Estate*, 1 Grant, 272. 4 Pittsburg Journal, 469. *Shuman's Appeal*, 27 Pa., 64. 19. A trustee may be a purchaser of trust property at a judicial sale, not controlled by himself, when purchased in good faith, to protect the interests of himself and others. *Lusk's Appeal*, 108 Pa., 152. 20. While it is a rule, that a trustee dealing with the property of his *cestui que trust*, cannot divert it to purposes foreign to the trust without the utmost openness and frankness, yet if the evidence shows that the trustee made full disclosures to his *cestui que trust*, who was of full age and under no disability, and there was no fraud, a *bona fide* purchase by the trustee of the property held by him in trust, for a full consideration, will be sustained. *Miggett's Appeal*, 109 Pa., 520. *Spencer's Appeal*, 80 Pa., 317. 21. A trustee cannot buy the property of his *cestui que trust* directly or indirectly. He cannot be both buyer and seller at the same time. The duties of the two characters are incompatible. The temptation to do wrong in such case is very great. Where a trustee's acts admit of two constructions, one rightful, the other tortious, in respect to his *cestui que trust* equity will chose the former and reject the latter. *McGinn vs. Schaeffer*, 7 W., 412. 22. Where a *cestui que trust* has no notice of a purchase by his trustee of trust property until the filing of the trustee's account, the statute of limitations will not begin to run against the former until that date. *Mullen vs. Doyle*, 147 Pa., 512. 23. It is an established rule, that a trustee will not be allowed to purchase the trust property at his own sale, unless by leave of the court first had, nor in any manner to make a profit out of the same. *Patterson vs. Lennig*,

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118 Pa., 571. 24. A person standing in a fiduciary relation to another, may not become the purchaser of the latter's interest in land for a price less than its value at a sheriff's sale brought about by his own procurement. *Rickett's Appeal*, 21 W. N., 229. 25. Where persons, acting in a fiduciary capacity, are interested in the purchase of real estate sold by them, or become so before the payment of the purchase money, their profits enure to the *cestui que trust*. *Rosenberger's Appeal*, 26 Pa., 67. 26. It is a well-settled principle of law, that a trustee cannot make profits out of the trust fund, and that if he purchases at his own sale, he purchases in trust for those interested in the fund. *Shutt's Estate*, 2 York Record, 103. 13 Lancaster Bar, 108. 27. In the absence of fraud, one who has sold an estate as trustee may afterwards fairly repurchase it for himself. *Silverthorn vs. McKinster*, 12 Pa., 71. 28. The rule of equity, which prohibits a trustee from purchasing the trust property, is not founded on the assumption that he is thereby guilty of fraud, It is a rule of public policy. *Webb vs. Dietrich*, 7 W. & S., 401. 29. The rule which prohibits a trustee from purchasing trust property is one of public policy, independent of the question of fraud, and it is always at the option of the *cestui que trust* to set aside the sale, whether *bona fide* or not. *Woods vs. McMillan*, 32 Pittsburg Journal, 363. 30. No trustee, or person acting in a fiduciary capacity, can become a purchaser at his own sale, directly or indirectly, or acquire an interest in the trust estate, without the consent of those for whose benefit he acts, or of the court having jurisdiction of the trust. *Worth's Estate*, 1 Chester Co., 297. *Hallman's Estate*, *Idem*, 141.

XXV. NEGLECT IN RENTING REAL ESTATE. A trustee of real estate, who demands such large rentals that he is unable to procure tenants, is not liable to be surcharged in the amount of income he might have received had he adopted another course. A trustee can never be surcharged for a loss arising from mere error of judgment and from no wilful default. This may be a strong reason for dismissing a

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trustee, but not for surcharging him. *Pleasanton's Appeal*, 99 Pa., 363.

XXVI. NEGLECT IN SALE OF TRUST PROPERTY. 1. A trustee to make public sale of real estate, cannot bind the trust estate by an agreement with real estate agents to procure purchasers. He makes such an agreement at his own risk. *Kuhn's Estate*, 38 Pittsburg Journal, 378. 2. Sales by trustees to near relatives are always suspicious, and should be vigilantly watched by courts of justice. *Lamberton vs. Smith*, 13 S. & R., 309. 3. A trustee or agent making a private sale, and arranging that his vendee should become the purchaser at a judicial sale, must answer to his *cestui que trust* for the amount actually received. Where a trustee sells land of his own and of the trust estate, receiving a portion of the purchase money in cash, and accepts stock or other securities in his own name for the balance, he cannot require his *cestui que trust* to receive any part of such stock or securities. *Parshall's Appeal*, 65 Pa., 224. 4. Trustees are liable to a surcharge, only when they are guilty of fraud, or supine negligence equivalent to fraud. *Springer's Estate*, 51 Pa., 342. 5. A purchaser, with notice, of trust property from a fraudulent trustee, is considered, in equity, a trustee for the beneficial owner. *Walsh vs. Stille*, 2 Chester Co., 427. 6. Trustees are not expected to possess powers of divination; integrity and prudence are all that are required of them. The harshest demand that can be made in equity is to hold a trustee answerable for a loss not caused by his wilful default. It is usually discretionary with him when to sell securities. *Woodward's Estate*, 27 W. N., 407.

XXVII. NEGLECT IN TRANSFER OF STOCK. Where stock stands upon the books of a corporation in the name of a trustee, the corporation is bound to inquire as to the authority of the trustee to transfer said stock, before they permit such transfer to be made. This rule does not apply to the case of executors or administrators transferring stock standing in the name of a decedent, for it is their duty to convert the person-

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alty into cash to pay debts and legacies. *McMurtrie vs. Penna. Co.*, 9 Phila., 531.

XXVIII. NEGLECT IN USE OF TRUST FUNDS. 1. Trust money is often applied in the first instance to the personal purposes of the trustee, with the most upright intention at the right time to make it right. He probably uses the moneys in full confidence in his ability to account for it when an account shall be required. *Buffington vs. Bernard*, 90 Pa., 67. 2. Where a trustee uses trust funds in his own business, resulting in their loss, the court has no discretion but to enforce the law by turning him over to imprisonment, and to the criminal courts for prosecution. *Croop vs. Freas*, 8 Pa. County, 107. 3. If a trustee appropriates trust funds to his own use, he renders himself liable to removal, to interest on the fund, to make good the principal, although lost, and to a criminal prosecution for embezzlement. *Drake's Estate*, 12 Luzerne Register, 19. 2 Kulp, 256. 4. The use by a trustee of trust moneys for private purposes is mismanagement, and he may be discharged therefor, even if he has given ample security on his bond. *Green's Estate*, 7 Phila., 502. 5. When the control of trust property is taken out of the power of the trustee by the act of the law or other paramount authority, he will not be regarded as standing in a fiduciary relation to it. Where the surviving partner of a decedent continues the business, and employs the executor and trustee of such decedent on the previous suggestion of the decedent, as clerk, with an interest in the profits due to the estate of the late partner, such trustee is not liable to surcharge for such profits of the estate in his hands. *Hall's Appeal*, 40 Pa., 409. 6. Where a trustee mixes trust funds with his own, as where he deposits them in bank in his own name, he is liable for interest. But where he deposits such moneys as trustee in a banking house of which he is a member, he is not chargeable with interest unless he received it. The rule that a trustee should not be permitted to derive any benefit, direct or indirect, from the trust estate, should not be carried so far as to pre-

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clude a trustee from depositing trust funds in a bank of which he is a stockholder. *Hess' Estate*, 68 Pa., 458. 7. Trustees cannot derive advantage from the administration of the trust property. Profit derived from land purchased by a trustee with trust money, shall go for the benefit of the *cestui que trust*. So an attorney, guardian or other person invested with a fiduciary character, must account for all profits to the client or ward, or other party whose means have been employed. *Kepler vs. Davis*, 80 Pa., 153. 8. Investment of trust funds in a trustee's individual name is concealment. Where a trustee speculates with trust funds, he may be held to profits, if the investment has been successful; interest, if disastrous. When trust funds can be traced into a particular investment, it belongs to the *cestui que trust*, if he so elect. An executor with funds of his own, and of the estate, purchased stocks; when the investment with trust funds could not be discriminated, the *cestui que trust* might select the most profitable investments as having been made for the estate. *Norris' Appeal*, 71 Pa., 106. 9. A testamentary trustee, who employs the trust funds in private speculations for his own benefit, is guilty of embezzlement. When such a person seeks the benefit of the insolvent laws, it is the duty of the court to commit him for trial. *Price, In re*, 16 Phila., 36. 10. The use of trust funds by the trustee will not always justify a claim for a proportionate share of profits, where the profits arise not only from the use of the money, but from the labor and attention bestowed by the party upon the business. The *cestui que trust* cannot, in such a case, claim as a right an equal participation of the profits. Where profits are made by the use of trust money, or by speculation with it, the owner of the money is entitled to claim them, but the personal labor devoted to the business, and which forms an element in the profits, cannot be so appropriated. *Sharpe's Estate*, 2 Phila., 281. 11. Where a trustee draws trust funds from a savings bank, and used them himself, he is justly chargeable with the interest it would have earned, had it been allowed to remain on deposit. *Whittaker vs. Peck*, 4 Kulp, 320.

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XXIX. NEGLIGENCE OF CO-TRUSTEES. 1. The duty of trustees is a joint one, and each is responsible for the neglect of the other. *Deal's Estate*, 18 Phila., 188. 2. Where a trustee with a knowledge of the insolvency of his co-trustee, transfers to him securities of the trust estate held by him, which securities are subsequently lost through such negligence, the transferring trustee is liable. *Evans' Estate*, 2 Ashmead, 470. 3. Co-trustees, except upon a legal default being shown, are not primarily liable for assets received by their co-trustee. *Emlen's Estate*, 26 W. N., 341. *Logan's Estate*, 2 W. N., 703. 4. The act of any one of several co-executors, in disposing of the personal assets of their testator, is the act of all and binds all. There is a distinction, in this respect, between executors and technical trustees. The latter must execute the duties of their office in their joint capacity, and the payment of a part of the trust fund to one of them without the knowledge or consent of the others, will not be a good payment, and a release by one alone will not discharge the debt. A trustee's duties relate to the custody and management of trust property, while the duty of an executor or administrator is to dispose of the personal property to pay debts. *Fesmire vs. Shannon*, 143 Pa., 201. 5. Trustees are responsible, ordinarily, for their own acts and omissions, but not for those of their associates. So an executor will not be liable for a *devisavit* committed by his co-executor, unless he has contributed in some manner to it. The fact that the co-trustees joined in executing receipts for money is not conclusive evidence that they are jointly liable; for, in the absence of fraud and negligence, each will be held liable only for what he actually receives. A trustee is not an insurer of the trust funds against loss, nor a surety for his co-trustee. His undertaking is personal, and requires of him good faith and reasonable diligence. If these requirements are met, he is not liable for losses occasioned by the bad faith or the crimes of his co-trustees. *Fesmire's Estate*, 134 Pa., 85. 6. Co-trustees are regarded in law as but one collective trustee, and they are required to execute the duties of their office in their join

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capacity, and the acts of any one of them, in respect to the administration of their trust, are not binding upon the co-trustees who have joined therein. Each executor, on the contrary, has a joint and entire authority over the whole of the testator's property, and the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all.

Fesmire vs. Shannon, 29 W. N., 37. 7. A testamentary trustee is not liable for money received exclusively by a co-trustee. This is the general doctrine, except where fraud or supine negligence appears. *Geddes vs. Irvine*, 5 Pa., 308. *Lancaster's Estate*, 18 Phila., 10. *Emlen's Estate*, 20 *Idem*, 50.

8. There is nothing in the relation as trustee to make the receipt by one, of itself, the receipt of all, in contemplation of law; nor can one trustee be made liable for the default of his fellow, without some act of omission or commission, indicating neglect of some ascertained duty. *Geddes vs. Irvine*, 5 Pa.,

513. 9. While trustees are not generally liable for the acts of each other, this rule does not apply in cases of negligence. If a will directs an investment to be made in good securities, a trustee who passively permits his colleague to make some other disposition of the property, and takes no steps to inform himself respecting it, will be held responsible. *Hilles' Estate*, 13 Phila., 402. 10. How far one trustee shall be responsible

for money received by another, is a delicate and important subject, on which the law is not yet well settled. If he consents that the other should misapply it, particularly where he has the power to secure it, he is responsible. *Pine vs. Downing*, 11 S. & R., 71. 11. Trustees are answerable generally each for what he receives, and for no more. It would seem that each may file a separate account, even where cited under the act, or they may join in an account. The accounts, when filed, may be on one sheet of paper, or on several, one of which exhibits property unsold, another property sold, another the sum paid to different creditors, and another debts still due. *Rush vs. Good*, 14 S. & R., 229. 12. Trustees are not liable for the acts and

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commissions of their co-trustees, unless there be fraud or negligence, and then only where the estate of the defaulting trustee is insolvent. *Stell's Appeal*, 10 Pa., 149. 13. In matters of discretion, in distinction from ministerial acts, co-trustees cannot act separately in discharging their trusts; their receipts must be joint, except in cases of urgent necessity. The consent of both to a contract is necessary. *Vandever's Appeal*, 8 W. & S., 409. 14. The instances in which a mere trustee has been charged with the defaults of his colleague are comparatively rare. It is unnecessary for executors to join in receipts, and if they gratuitously assume the character of joint receivers, they agree to trust each other, and become joint accountants; while no such conclusion follows from the receipts of trustees, who cannot choose but join. Held, that where there are joint trustees in good repute, each is chargeable with no more than he receives, unless he stood supinely by, while his colleague was manifestly impairing the estate. *Jones' Appeal*, 8 W. & S., 143.

XXX. NEGLECT OF DILIGENCE AND CARE. 1. The measure of diligence and care required of a trustee is precisely that which a man of ordinary prudence would practice in the care of his own estate. A reasonable degree of vigilance, and the exercise of good faith is the standard of the trustee's duty. *Bunting's Estate*, 17 Phila., 495. *Cline's Appeal*, 106 Pa., 620. *Fahnestock's Appeal*, 104 Pa., 46. *Sting's Estate*, 9 Montgomery Co., 185. 2. Diligence required of a trustee may be affected by the acts of the *cestui que trust*. *McClean's Appeal*, 31 *Pittsburg Journal*, 148.

XXXI. NEGLECT OF DUTY. 1. A trustee who has been guilty of wilful misconduct in the execution of his trust, is not entitled to commissions for his services. Nor will he be allowed credit for unnecessary traveling expenses. *Berryhill's Appeal*, 35 Pa., 245. 2. A trustee appointed by deed or will is amenable to the court of common pleas, unless it appear that the trust is annexed to the office of executor, *quasi* executor, or *ratione officii*, in which case the orphans'

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court alone has jurisdiction. *Baird, In re*, 1 W. & S., 288.

3. Misconduct in a trustee is always followed by a loss of commissions, especially when it is wilful. To entitle trustees to compensation, it is requisite that their duties should be performed at least with common honesty. *Clauser's Estate*, 84 Pa., 51.

4. Trustees, acting in good faith, and without wilful default, are not responsible for loss. Common skill, prudence and caution are all that equity requires. They are only liable for what they actually receive, except in cases of gross negligence. *Calhoun's Estate*, 6 W., 188. *Jack's Estate*, 11 Lancaster Bar, 175.

5. An unfaithful trustee is entitled to no favor. He stands exposed to every equity and every technical legal advantage which accrues to the *cestui que trust*. *Drake's Estate*, 3 York Record, 208. 2 Kulp, 256.

6. Trustees are not always chargeable for negligence or ignorance, and a trustee who has acted faithfully and by advice of counsel is not answerable for mistake. The most prudent could do no more. A trustee, who acts by other hands than his own, whether from necessity or in accordance with usage, is not responsible for losses, and this principal is applied to the custody of trust property. A counsel's act may affect his client with legal consequences, but not with moral fraud. Less negligence is necessary to charge a trustee with money in his hands, than with money lost. *During's Appeal*, 13 Pa., 234.

7. When a trustee commits all the care of the estate to agents or others, allowing them to keep the books and manage everything themselves, he is liable to be personally charged with the expense of stating the accounts and of all other things that his negligence may render necessary. *Emlen's Estate*, 20 Phila., 50.

8. It is a fundamental rule of equity, that a trustee shall not make profit of the fund for himself. He must not elude the conditions of the trust, by borrowing from it at simple interest, and use the proceeds for his own advantage. *Harland, In re*, 5 R., 333.

9. There exists no case where trustees have acted in good faith, and under the advice of counsel, in which they have been held responsible. *King vs. Morrison*, 1 P. & W.,

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188. 10. The court may displace a negligent trustee and appoint another in his stead. *Morrow vs. Brentzer*, 2 R., 190.
11. To charge a trustee for negligence, there must be proof of loss to the estate. *Maloney's Estate*, 27 Pittsburg Journal, 193.
12. While the courts are strict in their oversight of persons acting in a fiduciary capacity, and require a faithful performance of duty, yet at the same time they are charitably mindful of the negligences and errors which the most prudent are liable to commit. To care for the property of others is often a thankless task, and kind offices are requited with ingratitude. The duty, however, is voluntarily assumed, and when performed with fidelity and care, is deemed worthy of recompense. But if the contrary appear, not only is reward withheld, but personal liability exists for loss incurred. It should be a flagrant case to forfeit all compensation. There must be evidence of gross negligence, fraud and bad faith, even where a trustee has been surcharged in his account. *Miller's Estate*, 16 W. N., 115.
13. The general principle of equity, that a trustee will not be permitted to make any profit for himself out of the trust property or acquire therein an interest adverse to that of the *cestui que trust*, is not varied by the fact that the latter, through ignorance or obstinacy, has imposed upon the estate the necessity of certain legal proceedings, which might have been avoided by compromise. *McElwee vs. Rourke*, 3 Lancaster Review, 244.
14. Where a testator appoints a son trustee, and creates a spendthrift trust for his benefit out of a portion of his estate, the gross mismanagement of such trustee and his failure to keep accounts will not prevent him receiving his income from the trust fund which was left him free from his control, contracts, debts, liabilities or engagements. *Overman's Appeal*, 88 Pa., 276.
15. If beneficiaries lose by the neglect of their trustee, they must pursue him for redress, and not a third person, who was not challenged until it was too late for him to retreat. *Pepper vs. Robinson*, 32 W. N., 200.
16. Where a trustee's disregard of his duty has caused a suit to be instituted against him for his accounting, and, through lack of careful

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business methods, he has misapplied the trust funds, the costs will be imposed upon him. *Shearman vs. Morrison*, 149 Pa., 386. 17. If a trustee has mismanaged an estate and jeopardized the interests of the *cestui que trust*, he is not entitled to commissions. *Steger's Estate*, 11 Phila., 158. 18. The relationship between client and attorney is not such that the client must yield up his individual judgment, and with it his personal accountability, to his legal adviser. Where the path of duty of a trustee is clear, he cannot in all cases excuse himself by saying he obeyed the instructions of counsel. *Suplee's Estate*, 17 W. N. 29. 19. A prayer for the removal of a trustee for mismanagement, and that he deliver up the trust property in his hands, implies a prayer for an account. *Third Reformed Church vs. Fox*, 5 W. N., 399. 20. Acts of commission or omission, which amount to incompetency, or are in wilful disregard of common prudence, will justify the discharge of a trustee. *Wood's Estate*, 41 Pittsburg Journal, 222. 21. No commissions or compensation will be allowed a trustee who has converted assets of the estate to his own use, mingled the moneys of the estate with his own, and neglected to file an account. *Willit's Estate*, 20 W. N., 23.

XXXII. NEGLECT OF JURISDICTION TO APPOINT. Where a trustee, appointed by the orphans' court, has given bond, and subsequently squanders the estate, his sureties cannot object, when called upon to make good the loss, that the court had no jurisdiction to appoint him. *McConomy's Estate*, 170 Pa., 140.

XXXIII. NEGLECT OF POWER TO ACT. A trustee, *ex maleficio*, who has acted in good faith, is not liable to account for what he might have received for trust property, but what he actually received. In the absence of fraud or bad faith in the sales, the true measure of damages is the actual sales. *Greenwood's Appeal*, 92 Pa., 181.

XXXIV. NEGLECT OF TRUST PROPERTY. 1. If a corporation is trustee, and the plaintiff has a priority of payment, injunction lies to restrain a misapplication of trust funds. *Comm. vs.*

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Bank of Penna., 3 W. & S., 185. 2. Where the orphans' court has jurisdiction of a trust estate, it can follow the trust property into the hands of a third party, who holds it illegally with notice of the trust, and decree its restitution to the trustee. *Kaiser's Estate*, 33 Pittsburg Journal, 62. 3. Trust property squandered by a trustee can be followed wherever found, and if earmarked, equity will restore it to its rightful owner. Such owner is not bound by what his trustee has done or omitted to do, and may repudiate or rescind his contracts, saving, of course, the rights of innocent third parties. *Guillon vs. Peterson*, 89 Pa., 169. *Bohlen's Estate*, 75 Pa., 304.

XXXV. NEGLECT TO ACT. Where a default took place in the payment of interest upon the bonds of a railroad, and a trustee was appointed to represent the bondholders, he is under obligation to protect them so far as the property in his hands in trust for them will enable him to do so. If he neglects or refuses to move, any bondholder may proceed by bill to compel a sale of the property, a removal of the trustee or other relief. *Comm. vs. R. R.*, 122 Pa., 319.

XXXVI. NEGLECT TO ACT IN HARMONY. 1. While nothing less than actual mismanagement or other conduct jeopardizing the estate would justify the removal of a trustee upon the petition of a creditor, circumstances less grave, but which directly affect the comfort of the *cestuis que trustent* may cause the court to act upon the petition of the latter. *Hilles' Estate*, 9 W. N., 422. 2. When the relations between the trustee and the *cestui que trust* are so inharmonious as to hinder a proper execution of the trust, relief, if desired, should be sought in the manner provided by the act of April 9, 1868. *Howell's Estate*, 16 Phila., 232. 3. While the power of the court under the act of April 9, 1868, to appoint a new trustee will not be capriciously exercised at the mere whim of a *cestui que trust*, yet it is sufficient to justify its exercise, to show that the relations between the *cestui que trust* and trustee were hostile, and that the trustee acted without consulting his

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wishes. *Marsden's Estate*, 3 Pa. Dist., 281. 4. Where the existence of hostile relations between the *cestui que trust* works disadvantage, inconvenience or great discomfort to the latter, the trustee will be removed. *Marsden's Estate*, 166 Pa., 213. 5. Incompatibility of disposition in the trustees will justify their removal in the interests of the *cestui que trust*. *Seyfert's Estate*, 3 W. N., 565. 6. The court will remove a trustee, whose conduct shows ignorance, incompetence and stubbornness, and whose relations with his co-trustee are inharmonious. *Simon's Estate*, 2 Pa. Dist., 194.

XXXVII. NEGLECT TO ALLOW COMMISSIONS. The fact that trustees under a will have already received commissions as executors of the testator, does not preclude them from charging a commission upon the income as compensation for administering the trust estate. *O'Donnell's Estate*, 5 W. N., 534.

XXXVIII. NEGLECT TO APPOINT. 1. An executor is not bound to invest the money shown by the account to be in his hands, until a suitable person is appointed as trustee by the court to take charge of it. It is the duty of the *cestui que trust* to see that such trustee is appointed. *Bishop's Estate*, 1 Lancaster Review, 115. 2. The want of the appointment of a trustee in a will does not change the nature of the trust, which is upheld in equity as well without as with a trustee. *Shonk vs. Brown*, 61 Pa., 320.

XXXIX. NEGLECT TO CHANGE INVESTMENTS. Where a trustee continues the trust fund in the same securities in which the party creating the trust had placed them, without objection of the *cestui que trust*, and without question as to the credit of the institution, where the most prudent parties had placed their property, he will not in general be held responsible if a loss occurred, provided he acted in good faith. *Barton's Estate*, 1 Parsons, 24.

XL. NEGLECT TO CHARGE COMMISSIONS. A trustee, having paid over the income to the *cestui que trust* for years without deducting his commissions, which were not charged in the semi-annual accounts furnished, is not estopped from

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claiming them in his final account. *Wister's Appeal*, 5 W. N., 373. 86 Pa., 160.

XLI. NEGLECT TO COLLECT TRUST FUNDS. 1. In order to charge trustees with loss arising from accepting low rents, it is not enough that more rent might have been received, but it must be shown that there was fraud or negligence in the selection of the agent who was employed to attend to the renting and collection of the rents of the real estate. *Beck's Estate*, 5 W. N., 274. 2. It is well settled, that a trustee shall not be surcharged by a court of equity for a loss which has occurred, in case he has exercised common skill, prudence and caution, but for supine negligence or for wilful default he shall be held responsible. In considering whether a trustee has made himself liable for failure to collect and convert the assets in his hands, regard must be had to the character of the trust. Thus, a guardian would not be held to such prompt action in enforcing the collection of securities as an executor or administrator, as the duty of the former is merely to hold and retain. *Chambersburg Saving Fund's Appeal*, 76 Pa., 228. 3. There is no case where trustees, acting in good faith and under the advice of counsel, have been held personally responsible for expenses contracted in the proper performance of their duty. *King vs. Morton*, 1 P. & W., 88. *France's Estate*, 16 W. N., 350. 4. It has been said that the harshest demand that can be made in equity is to hold a trustee answerable for what was never in his hands, or for a loss not caused by his wilful default. *Jack's Appeal*, 94 Pa., 367. 5. Trustees need only exercise common skill, prudence and caution, and are only liable for what they actually receive, except in cases of fraud or gross negligence. *Mowrer, In re*, 10 Lancaster Review, 130. 6. For a mere error of judgment, a trustee will never be surcharged with moneys which have not come into his hands. *Wilkinson vs. Nichols*, 20 W. N., 351. 7. Trustees are not liable for loss of rent, if they have used reasonable diligence in their attempts to collect it. *Patterson's Estate*, 35 Pittsburg Journal, 192.

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8. Very supine negligence might in some cases charge a trustee with more than he had received, but then the proof must be very strong. If there was no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him. You cannot affect the trustees with more than they actually received without wilful default. All that a court of equity requires from trustees, is common skill, common prudence and common caution. Especially where a trustee is under professional advice will he be protected. *Neff's Appeal*, 57 Pa., 96.

XLII. NEGLECT TO COMPENSATE. 1. A legacy given as compensation to a trustee is entitled to preference over a gratuity in the distribution of testator's estate. A trustee mingling trust funds with his own is not entitled to commissions. *Harper's Appeal*, 33 *Pittsburg Journal*, 261. *Semple's Estate*, *Idem*, 267. 2. As a general rule, commissions on the principal sum coming into the hands of a trustee, and on the re-investment thereof, will not be allowed, particularly where the usual commission of five per cent. has been charged on the interests and profits derived from such investments. *Hemp-hill's Estate*, 1 Parsons, 30. 3. No commission to a retiring trustee can be awarded out of the *corpus* of the estate, until the trust is ended and the fund ready for distribution, unless for extraordinary services. No allowance will be made to a trustee out of the estate to reimburse him for expenses in resisting an effort to displace him. *Mintzer's Estate*, 18 Phila., 97. 4. In the absence of fraud, wilful misconduct, actual loss to the estate, or the assumption of a position hostile to the interests of the *cestui que trust*, a trustee will not be punished by being deprived of his commissions, even though he may, as a consequence of his negligence or mistake, be surcharged with a loss. *Page's Estate*, 18 Phila., 102. 5. A trustee's compensation is not to be fixed by any inflexible rule, but depends on the circumstances of the case. For the sale of real estate, two and one-half per cent. has generally been regarded as proper compensation. A trustee who vexes the heirs and delays distribution

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by an exorbitant claim for commissions, is not entitled to the same compensation as one who makes a reasonable claim. *Carrier's Appeal*, 79 Pa., 230. *Perkins' Appeal*, 108 Pa., 314. *Scheidt's Estate*, 2 Woodward's Decision, 356. *Maurer, In re*, 1 Schuylkill Record, 193. 6. To entitle a trustee to receive a commission of more than five per cent. of the estate managed he must show extraordinary labor on his part in the management. Generous compensation will be allowed trustees, when through their labors a large benefit enured to the estate. *Rynd's Estate*, 41 Pittsburg Journal, 109. *Brolasky's Estate*, 36 W. N., 264. 7. Compensation of trustees is to be determined by their responsibility and labor. Where there is gross negligence, no compensation will be allowed. *Roup's Estate*, 31 Pittsburg Journal, 106. *Breeter's Estate*, 12 Lancaster Bar, 159. 8. The usual allowance to a trustee is five per cent. upon the annual income, where no risk is involved; where there is risk, then in addition thereto, he is entitled to receive five per cent. upon the *corpus* of the fund, when he settles his account. *Stoner's Estate*, 1 York Record, 129. 9. Compensation to trustees is of modern growth, and there is no established rule by which the compensation of trustees is regulated. Each case arising must be decided on its own merits. *Wernle's Estate*, 13 Phila., 328. 10. A trustee's claim to compensation is not confined to the income of a fund. He may in certain cases be paid out of the *corpus*. *Whitehill's Estate*, 3 Delaware Co., 48. 11. The fact of a trustee having been discharged by the court does not necessarily deprive him of commissions. *Welscher's Estate*, 3 Walker, 241.

XLIII. NEGLECT TO CONVEY. A trustee will be compelled to convey the estate to the *cestui que trust*. Where there is nothing further to be done by the trustee, a bare trust remains, which the law executes in favor of the devisees, and gives them the legal estate free of the trust. *Apple's Estate*, 3 Phila., 23. 2. Where one procures a title which he could not have obtained except by confidence reposed in him,

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and abuses the confidence, he becomes a trustee *ex maleficio*, *Seichrist's Appeal*, 66 Pa., 237.

XLIV. NEGLECT TO DISCHARGE. The summary proceeding under the act of May 1, 1861, for the discharge of a trustee will not be entertained, unless it clearly appears that the interests of the estate are likely to be jeopardized. It is not to be applied simply because there are disagreements among trustees. *Morgan's Estate*, 26 W. N., 236. *Theis' Estate*, *Idem*, 302.

XLV. NEGLECT TO DISCONTINUE LITIGATION. A trustee will not be permitted to carry on unnecessary litigation to the injury of a third person, merely for the purpose of earning commissions. *Frevall vs. Barclay*, 5 Clark, 269.

XLVI. NEGLECT TO DISCONTINUE TESTATOR'S BUSINESS. A trustee who carries on the business of the testator for the benefit of the estate, as directed by the will, is not personally liable for any losses not caused by evident negligence on his part. *Allen's Estate*, 20 Phila., 98.

XLVII. NEGLECT TO EMPLOY COUNSEL. 1. Trustees who have acted in good faith, and under the advice of counsel, are not responsible for a mere error of judgment, or a mistake of law. Trustees must of necessity seek the advice of counsel in the performance of their duties. Not to do so would, in many instances, be gross negligence. It would be a harsh rule to require trustees to seek legal advice and then hold them responsible for an error of law committed by their counsel. It would throw the execution of trusts into the hands of knaves or fools. *During's Appeal*, 13 Pa., 235. *Bradley's Appeal*, 89 Pa., 514. *Myers' Appeal*, 62 Pa., 109. 2. Ordinarily, where several trustees choose to employ separate counsel, the estate can be made to pay only one fee. The same rule obtains in England in regard to costs. *Hurley's Estate*, 7 Pa. County, 23. *McDaniel's Estate*, 9 *Idem*, 232.

XLVIII. NEGLECT TO ENTER SECURITY. A sale of real estate by a trustee, under the act of April 18, 1853, is not void, because security was not given before it was ordered or made.

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It is sufficient, that security was given before confirmation of the sale. *Thorn's Appeal*, 35 Pa., 47.

XLIX. NEGLECT TO GRANT COMMISSIONS. Compensation to a trustee is not a gratuity, but a reward for faithful and beneficial services, and where he has failed to perform his duty, he will not be allowed any commission. The expenses of an audit unduly protracted by the failure of the trustee to make a full account should be borne by the trustee. *Nagle's Estate*, 12 Phila., 25.

L. NEGLECT TO KEEP UP INSURANCES. A trustee is bound to keep up insurances which were on the property when it came into his hands. *McNickle vs. Henry*, Legal Gazette Report, 416. 9 Phila., 243.

LI. NEGLECT TO OBEY DECREE. A court of equity has power, since the act of 1842, to enforce a decree for the payment of money by a trustee, by process of attachment against his person; arrests in proceedings as for contempt to enforce civil remedies, being excepted from the operation of that act. *Chew's Appeal*, 44 Pa., 247.

LII. NEGLECT TO PAY INTEREST. 1. Unless a trustee keeps a balance of cash on hand disproportioned to the current expenses of the trust, he is not chargeable with interest, nor is he chargeable with interest on small balances on hand which cannot readily be profitably invested. *Griffith's Estate*, 27 W. N., 488. 2. A trustee cannot be charged with interest upon the interest of the trust funds in his hands, when not called for or demanded. *Robinson's Estate*, 1 Pearson, 423.

LIII. NEGLECT TO PERFORM DUTIES. No trustee can perform his ordinary duties by such an expensive agent as an attorney at law and expect the estate to foot the bill. *Kidder's Estate*, 3 Kulp, 443.

LIV. NEGLECT TO PROTECT THE TRUST. A trustee sued by a stranger on a title hostile to his *cestui que trust*, in order to protect himself by the recovery against him, must at least show that he has acted *bona fide*; that the *cestui que trust*, if

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sui juris, was notified of the suit, and had an opportunity to defend. *Mackey vs. Cortes*, 70 Pa., 354.

LV. NEGLECT TO REALIZE ON INVESTMENTS. Much is left to the discretion of a trustee into whose hands investments made by the testator himself may come, and if, in the honest exercise of that discretion, he delays the realization, he may not be held liable for any loss arising from such delay. *Williamson's Estate*, 12 Phila., 64.

LVI. NEGLECT TO REDUCE RENTS OF ESTATE. That a trustee has, by refusing to accept reduced rents for the trust property in a time of business depression, caused a serious diminution of the income, is no ground for his discharge at a later period when the return of prosperity has rendered the estate productive. *Dugan's Estate*, 16 Phila., 250.

LVII. NEGLECT TO REMOVE. 1. It is not a sufficient reason to vacate the appointment of a trustee to make sale in partition, that he has his domicil in an adjoining state. *Culp's Estate*, 5 Pa. County, 582. 2. A trustee will not be removed upon the ground of advanced age and of mental and physical infirmities, where he has associated with himself a young and competent man as co-trustee. *Dugan's Estate*, 12 Pa. County, 591. 3. The act of April 9, 1868, authorizes the removal of a trustee upon the prayer of the *cestui que trust* only upon cause shown. This cause, however, need not be something which would jeopardize the trust estate; it is enough to show that the retention of the trustee would probably work disadvantage or inconvenience to the *cestui que trust*. *Hilles' Estate*, 14 Phila., 247. 4. A decree removing a trustee is proper, where it appears that he did not keep proper accounts; that he did not file an account for seven years and then had to be cited; that he mixed trust funds with his own; that he refused to pay over moneys belonging to the *cestui que trust*, and to satisfy a mortgage that had been paid off; that he had made improper investments, and was ignorant and incompetent. *Simon's Estate*, 155 Pa., 215. 5. The act of April 9, 1868, authorizing the courts to appoint and remove trustees, giving

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the *cestui que trust* the right to choose trustees, is so far directory, as to permit the court to judge as to the advisability of removal of a trustee at the mere whim of a *cestui que trust*, who possibly in the original appointment was intended to be protected against himself. *Stevenson's Appeal*, 68 Pa., 105.

6. A trustee will not be removed except for good and sufficient reasons; especially is this so in the case of a testamentary trustee, who was presumably selected by the testator on account of confidence in his integrity and fitness to perform the duties of the trust. *Theis' Estate*, 20 Phila., 38.

LVIII. NEGLECT TO SEPARATE TRUST FUNDS. 1. Trustees who mingle moneys of the estate with their own, and use the same in their private business, will be charged with interest or profits as may be claimed, and deprived of their commissions. Whatever is lost by a trustee in such case must be borne by himself, and whatever is gained belongs to the *cestui que trust*. *Deal's Estate*, 18 Phila., 188. *Lardner's Estate*, 16 W. N., 441. 2. When trustees blend trust funds with their own, they will be treated as borrowers of the fund, so far as interest is concerned. *Kidder's Estate*, 3 Kulp, 443. 3. It is a breach of duty in a trustee to mix trust funds with his own. It is his plain duty to pay it to the *cestui que trust*, as received, and if it has made profit or interest, such increment belongs to the *cestui que trust*. The *onus* is upon the trustee to show it has been kept apart and not used by him. *Roberts' Appeal*, 9 W. N., 125. 4. Where a trustee has speculated with trust funds of an estate and mingled them with funds of other parties, he is liable to surcharge in case of loss, and will not be allowed any commissions, even where services theretofore have been faithfully performed by him. *Richardson's Estate*, 12 W. N., 386. 5. If a trustee, without reasonable cause, and to any considerable amount, mixed up his private funds and accounts with those of the trust estate, he might be removed; but where the sums are small, and for convenience deposited with his own money, until a large amount had accumulated sufficient to make a deposit, it would not justify his discharge, though it

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is always attended with peril to the trustee. *Syfert's Estate*, 9 Phila., 320. 6. The mingling by the accountant of the funds of the estate with his own is usually so indicative of negligence or fraud, as to call for the infliction of a penalty. *Williamson's Estate*, 7 W. N., 82.

LIX. NEGLECT TO RESIDE IN THE STATE. The act of June 14, 1836, makes it lawful for the court having jurisdiction to remove a trustee who shall have removed from the state, or ceased to have a known residence therein for a period of a year or more. *Bloomer's Appeal*, 83 Pa., 45.

LX. NEGLECT TO SELL TRUST PROPERTY. 1. Where a trustee, acting in good faith, in his discretion retains securities which came into his hands from a former trustee, as assets of the trust estate, the fact that such securities depreciate in value and cause loss to the estate, is not a sufficient reason for discharging the trustee, nor deprive him of compensation for his services. *Fahnestock's Appeal*, 104 Pa., 46. 2. Ordinarily, it is an act both of duty and prudence for an executor or administrator to turn the testator's goods into available funds, yet cases may be imagined in which too sudden a sale would be a manifest breach of trust. As a trustee, he should manage the estate carefully so as to preserve and keep the same productive of income. He has a larger discretion than an administrator. *Williamson's Estate*, 7 W. N., 82.

LXI. NEGLECT TO TAKE ADVICE OF COUNSEL. A trustee, exercising ordinary prudence, will be protected, where, in good faith, he has acted under advice of counsel, as to matters falling within the scope of professional advice. Questions of title and priority of lien are properly submitted to counsel, but not questions as to the value of lands. *Smith's Estate*, 14 W. N., 93.

LXII. NEGLECT TO USE GOOD JUDGMENT. In civil cases a trustee who has acted in good faith, and by advice of counsel, is not liable for a mistake. *Speidel's Estate*, 3 Lancaster Review, 250.

LXIII. NEGLECT TO WARRANT TITLE. A purchaser may

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not call on a trustee for a covenant of title, because it is neither just nor politic to require a vendor to warrant a thing in which he has not a personal interest. No man would accept the office of trustee if it placed him in that predicament. Being answerable for nothing but fair dealing, he is bound only to warrant that he has not encumbered the title. *Adams vs. Humes*, 9 W., 305.

Trust Companies.

NEGLECT TO GUARD BONDS DEPOSITED IN THEIR SAFES. A safe deposit company rented safes in its alleged burglar-proof vaults, subject to the following regulations: Whenever a party rents a safe, and deposits therein at pleasure, the contents not being made known to the company, its liability is limited, (1) To the keeping of a constant and adequate guard and watch over the safe. (2) To the prevention of access by any renter to the safe of any other renter. (3) To the protection of safes and contents from any dishonesty of the company's employees. A number of bonds deposited in a safe were abstracted. Held, that the company was bound to make some explanation for the absence of the bonds, and a jury should determine if the company had been guilty of negligence. *Safe Deposit Co. vs. Pollock*, 85 Pa., 391.

Turnpike Companies.

NEGLECT IN GRADING ROAD. An incorporated turnpike company, undertaking to lower the grade of a road while in receipt of tolls and the road open for travelers, is bound to guard that part retained for public use, to warn travelers of obstructions, and to direct them in the proper route. They cannot shift these responsibilities upon others. *Lancaster Avenue Co. vs. Rhoads*, 116 Pa., 377.

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Unseated Land.

I. NEGLECT BY ABANDONMENT. 1. It is only by an abandonment, entire, unlimited in duration, and intentional, and so long and so clear as to show there is no intent to resume the occupancy, that a town lot, once seated, can become liable to be treated as unseated land, unless taxed as such with notice to the owner. *Negley vs. Breeding*, 32 Pa., 325. 2. Abandonment is an entire dereliction of the possession and occupancy of land. Where the interruption of a settler's residence is for a less period than five years, it is for the jury to determine, under the evidence, whether there existed an intention to abandon. *Whitcomb vs. Hoyt*, 30 Pa., 403.

II. NEGLECT IN ASSESSMENT OF TAXES. An assessment of a certain number of acres of land, without any other description or means of identity, in the name of a person unknown in connection with the title or possession of the land, will not support a sale of the land as unseated for taxes. *City of Philadelphia vs. Miller*, 49 Pa., 440.

III. NEGLECT IN CONVEYING. Land was sold for taxes; the treasurer making the sale executed the deed after his term of office. Held, that the deed was void. *Hoffman vs. Bell*, 61 Pa., 444.

IV. NEGLECT IN DESCRIPTION. 1. A misstatement of the number of acres in a tract will not vitiate the sale of the whole. *Reading vs. Finney*, 73 Pa., 467. 2. A sale of unseated lands for taxes will pass the title, though assessed in a wrong name, or by a wrong number, if otherwise designated so as to be capable of identification. *Woodside vs. Wilson*, 32 Pa., 52.

V. NEGLECT OF ASSESSMENT FOR TAXES. There must be an assessment, regular or irregular, for the particular year, for

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the taxes of which the land is sold. *McReynolds vs. Longenberger*, 75 Pa., 13.

VI. NEGLECT OF COUNTY TREASURER. 1. A sale of lands by the treasurer, which were seated at the time the taxes were assessed is void, as is also the case where a sale by him for taxes is made after the taxes were paid. *Cranmer vs. Hall*, 4 W. & S., 36. *Dougherty vs. Dickey*, 4 Idem, 146. 2. Where township taxes assessed upon unseated lands, and collected by the county treasurer, are not paid over by him, the county is responsible to the township for his default. *Potter Co. vs. Oswayo vs. Township*, 47 Pa., 162.

VII. NEGLECT OF INQUIRY. An owner of unseated lands is bound to take notice of the statutes authorizing it to be sold for taxes, and of the entries in the county commissioners books. An estoppel can only be pleaded by one who was adversely affected by the act which constitutes it. Consequences which result from a party's own mistake or neglect are not ground of estoppel. *Cuttle vs. Brockway*, 32 Pa., 45.

VIII. NEGLECT OF NOTICE. An owner who has paid no taxes at all on his land for three years, is not entitled to notice of its change to the unseated list. *Bechdle vs. Lingle*, 66 Pa., 38.

IX. NEGLECT OF OWNER. The mere neglect of the equitable owner to pay to the parties who made the application for him the entire sum stipulated for discovering the land, and having the surveys made and returned, would not transfer the title to them, nor authorize them to take out patents in their own or another's name, and hold the land. *Brock vs. Savage*, 31 Pa., 410.

X. NEGLECT TO OCCUPY. 1. Residence without cultivation, or cultivation without residence, will prevent land from being sold as unseated. Cultivation is sufficient without regard to the value of the product or its adequacy to discharge the taxes. *George vs. Messinger*, 73 Pa., 418. 2. The usual way of seating wild lands is first, by residence, and second by cultivation, in such a manner as to indicate permanent occu-

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pation. If the land be not capable of residence or cultivation, it may be seated by the derivation of profits therefrom by the owner. To enable a mere trespasser to seat a tract of land by enjoyment of profits, a permanent use of the land is necessary. A mere digging of coal in the winter with an abandonment of the property for the rest of the year is not sufficient. *Jackson vs. Stoetzel*, 87 Pa., 302. 3. Nothing short of an actual possession permanently continued will take away from the owner the possession which the law attaches to the legal title. Actual possession does not consist in temporary acts on the land, without an intention to seat and occupy it for residence and cultivation or other permanent use consistent with the nature of the property. *Young vs. Herdic*, 55 Pa., 172.

XI. NEGLECT TO PAY TAXES. 1. A *bona fide* attempt to pay all the taxes, frustrated by the fault of the treasurer, stands as the equivalent of actual payment. It is not the owner's duty to search the tax books. *Breisch vs. Coxe*, 81 Pa., 336. 2. A redemption by the owner of unseated land that had been sold for taxes, made in proper time, is valid, though by mistake of the county treasurer, he did not pay all the taxes that were against it. *Bubb vs. Tompkins*, 47 Pa., 359. 3. A sale of unseated land passes the title to the purchaser, although the land may not have been taxed and sold in the name of the real owner. *Franklin Coal Co. vs. Bertels*, 109 Pa., 550. 4. If the owner of unseated land sold for taxes during his minority redeem within two years after arrival at age, under the act of March 13, 1815, he must pay the purchaser the value of improvements. *Lynch vs. Brudie*, 63 Pa., 206. 5. Unseated lands are alone liable for taxes assessed thereon; there is no personal responsibility upon the owner thereof. *Neill vs. Lacy*, 110 Pa., 294. 6. A purchaser of unseated land sold for unpaid taxes, when he receives his deed, takes but an inchoate or inceptive title, which requires the lapse of two years from the date of sale to ripen into an absolute title. This it will do, if the land be not redeemed in the meantime. The only certain interest the buyer has up to that

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time, by virtue of his purchase, is in the money paid, and twenty-five per cent. on that amount on redemption. *Shale-miller vs. McCarty*, 55 Pa., 188. 7. Where land is purchased at a treasurer's sale of unseated lands for the non-payment of taxes, the title of the former owner is not fully divested until the expiration of two years after the sale. *Woodland Oil Co. vs. Shoup*, 107 Pa., 293.

XII. NEGLECT TO REDEEM. The act of March 13, 1815, provides that minors or lunatics, whose unseated lands have been sold, are entitled to two years after removal of their disability wherein to redeem the same. *Metz vs. Hipps*, 96 Pa., 15.

XIII. NEGLECT TO RETURN SURVEY. The consequence of the neglect of a warrantee to return his survey within a reasonable time, is that he is postponed to an intervening right, which is followed up with vigilance. *Kirkpatrick vs. Vanhorn*, 32 Pa., 131.

XIV. NEGLECT TO RETURN A WARRANT. Presumption of abandonment by neglect to return a warrant for twenty-eight years is rebutted by the possession of the land by the warrantee and tenants during the time. *Burford vs. McCue*, 53 Pa., 427.

Usury.

I. NEGLECT IN CHARGING. 1. Where a transaction is a mere change of securities for the same usurious loan, the law will apply the payments of usurious interest as payments upon the principal. *Blymeyer vs. Colvin*, 127 Pa., 118. 2. Mere inadequacy of price is not usually a ground for setting aside a contract; yet an unfair advantage taken of expectant heirs and legatees by the purchase of a legacy payable at a future time, at a usurious discount, will be set aside in equity, even if the legatee imposed upon was of full age. *Bogle's Estate*, 9 W. N., 256. 3. Where a lender of money exacts as a condition of the loan that the borrower shall purchase of him land at an exorbitant price, the transaction is usurious. *Earnest*

Usury—Continued.

vs. *Hoskins*, 100 Pa., 551. 4. The legislature did not intend to render a contract for the loan of money entirely void, although more than six per cent. interest be reserved. It is only invalid for the excess. The offence of usury is not consummated, until more than the amount loaned with legal interest, bonus included, has been received. *Exchange Bank vs. Sexton*, 3 Phila., 65. 5. Usurious interest can be deducted from the principal, but does not defeat the right to recover the amount due. *Fisher vs. Bank*, 3 Walker, 477. 6. The payment of usurious interest, after a debt becomes due, is not a valid consideration for an agreement to give time. *Hartman vs. Danner*, 74 Pa., 36. *Shaffer vs. Clark*, 90 Pa., 94. 7. The payment of usury, under whatever form it may be concealed, will not be enforced, if it can by any means be discovered. *Hartranft vs. Uhlinger*, 115 Pa., 270. 8. Where a defendant has paid usurious interest on a judgment, and has confessed a revival, he is not precluded thereby from asking that the latter judgment be opened on the ground of usury. *Heckman vs. Association*, 1 C. P. Reporter, 61. 9. If a national bank takes more than legal interest, it forfeits the entire interest. *Lucas vs. Bank*, 23 Pittsburgh Journal, 41. 10. No device can render a usurious contract other than usurious. *Marsh vs. Robeno*, 5 Phila., 190. *Shaffer vs. Clark*, 7 W. N., 459. 11. By the act of May 28, 1858, if a higher rate of interest than six per cent. be reserved or contracted for, the debtor shall not be required to pay the excess. At his option, he may retain or deduct it from the amount of his debt, or if he has voluntarily paid the debt and an excess of interest, he may recover such excess by action instituted not more than six months after the payment. *Miners' Bank vs. Roseberry*, 81 Pa., 312. 12. The defence of usury may be raised by others than the borrower. Thus a purchaser of real estate, subject to the lien of a judgment, may set up the defence of usury to the payment of the judgment entered against the property at the time of his purchase. *Miners' Trust Co. vs. Wren*, 6 Lancaster Bar, No. 33. 13. Six per cent. being the legal rate of

Usury—Continued.

interest, any excess over that amount may be deducted by the borrower from the amount of debt remaining unpaid. *Mitchell vs. Emery*, 24 **Pittsburg Journal**, 50. 14. Since the passage of the act of May 28, 1858, the taking of usury is not unlawful in this state. The creditor cannot coerce its payment by suit or process, and the debtor may recover it back, if the action be brought within six months after payment. *Montague vs. McDowell*, 99 Pa., 265. *Scott vs. Harper*, 5 **Montgomery Co.**, 143. 15. Where a party gave several bonds and mortgages to one creditor upon tracts of land, and was charged usurious rates of interest, and where he subsequently paid off all but one bond and mortgage, and paid usurious interest in each case, held, that in the payment of the last bond and mortgage, he could set off the excess of interest previously paid the creditor on the other obligations. *Parker vs. Soulouff*, 94 Pa., 527. 16. When the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious. *Philadelphia & Reading R. R. vs. Stichter*, 11 **W. N.**, 325. *Truby vs. Mosgrove*, 118 Pa., 93. 17. Where a mortgage is usurious, the mortgagor has a right, under the act of May 28, 1858, to retain and deduct the excess from the mortgage debt, but the right to do so is strictly personal, and could not be exercised by the terre tenants. *Stayton vs. Riddle*, 114 Pa., 464. 18. Interest at a higher rate than is fixed by law, where agreed upon by the parties, is not fraud *per se*, and is not punishable as a crime. *Titusville Bank's Appeal*, 25 **Pittsburg Journal**, 161. 19. In an action by a national bank upon a note discounted by it at an illegal rate of interest, only the face of the note can be recovered; the usury works a forfeiture of the entire interest. *Uniontown Bank vs. Stauffer*, 27 **Pittsburg Journal**, 114.

II. NEGLIGENCE IN CONTESTING. 1. Subsequent creditors cannot contest a claim for usury, unless in the inception of the contract it was intended to defraud them, or would necessarily have that effect. *Lombaert vs. Morris*, 2 **Delaware Co.**, 457.

Usury—Continued.

2. A subsequent judgment or mortgage creditor cannot attach a previous encumbrance on the ground that it contains usurious interest, without proof of an intent to defraud him thereby. The mere fact that a debtor has paid or agreed to pay more than six per cent. interest is not enough to establish a fraud upon creditors, and the mere refusal of the debtor to contest the claim does not, of itself, amount to such fraud. *Wheelock vs. Wood*, 93 Pa., 298. 7 W. N., 319. *Lennig's Appeal*, *Idem*, 301.

III. NEGLECT IN PAYING. 1. The fact that a debtor voluntarily paid more than six per cent. interest, and made a settlement on that basis, does not preclude him from setting up the defence of usury to an action brought to enforce such settlement. When the consideration of a confessed judgment is made up in part of usury, the court will open the judgment and afford relief. *Marr vs. Marr*, 110 Pa., 60. 2. It is not unlawful for a debtor to pay, or for a creditor to receive, more than the legal rate of interest, and when done in good faith and in the usual course of business, other creditors have no cause to complain. *Nicholson's Appeal*, 20 W. N., 339. 3. It is not unlawful for a debtor to pay more than six per cent. interest, and a creditor cannot attach such transaction, unless the agreement to pay a higher rate was part of a scheme to cheat and defraud the other creditors of the debtor. *Selser's Estate*, 141 Pa., 529.

IV. NEGLECT TO AVER. If the assignee of a judgment became the purchaser of it in good faith, relying upon a certificate of no defence given by the defendant, there is an end of any defence by the latter upon the ground of usury or for any other reason. *Scott's Appeal*, 123 Pa., 155.

V. NEGLECT TO AVOID. 1. Any security given in payment or discharge of an usurious security is equally void with that. The original taint attaches to all consecutive securities growing out of the original transaction. A *bona fide* payment of an usurious debt extinguishes it, and a subsequent loan would be valid. *Campbell vs. Sloan*, 62 Pa., 481.

Usury—Continued.

2. Successive evidences of indebtedness, even where there is a change in the rate of interest and of the security, are parts of the same transaction. *Riegel's Estate*, 16 W. N., 131.

3. All consecutive securities growing out of a usurious contract are tainted therewith, and none of them, however remote, can be free from it if the descent can be traced. *Schutt vs. Evans*, 109 Pa., 625.

VI. NEGLIGENCE TO CONSTITUTE. 1. If, besides interest, a certain gain be reserved, it is usury; but, if it be doubtful whether it may not be a loss, it is not usury. *Philip vs. Kirkpatrick*, Addison's Rep., 125. 2. Where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious. *Truby vs. Mosgrove*, 35 *Pittsburg Journal*, 356.

VII. NEGLIGENCE TO DEFALK. 1. Any usurious interest paid will be deemed a credit on the principal sum due, but the proper forum to determine the question of usury in the case of a judgment regularly entered, is not an auditor, but the court in which the judgment was entered, on motion to open the judgment and allow payments to be shown. *Mahoney's Estate*, 15 Pa. County, 302. 2. Usurious interest included in the amount of a judgment confessed cannot be recovered back after the judgment has been paid by the defendant in full. The same is true, where the judgment was for want of appearance or plea, or on the verdict of a jury. The judgment could have been opened on application, and the excess beyond legal interest would have been stricken from it. But the judgment only carried legal interest from the time it fell due. Any voluntary payment in excess of lawful interest, where the whole debt is paid, may be recovered back by suit commenced within six months from the time of such payment. *Hopkins vs. West*, 83 Pa., 110. 3. Where an original judgment is revived after the payment of usurious interest thereon, without credit allowed for such payment, the defendant cannot have the amount so paid deducted from the proceeds arising from an execution on

Usury—Continued.

such judgment. He should have applied to the court to open the revived judgment. *Rutherford vs. Boyer*, 84 Pa., 347.

VIII. NEGLECT TO INSTITUTE SUIT TO RECOVER. 1. Under the act of 1858, when a greater rate of interest than six per centum per annum is bargained for, no penalty is exacted, but the borrower or debtor is not bound to pay the excess, and may retain or deduct it from the debt, or having paid it, may recover it at any time by suit instituted within six months after the payment. *Heath vs. Page*, 48 Pa., 146. 63 Pa., 121. 2. The suit to recover back usury paid may be brought within six months after the last payment on the debt and interest. *Woodworth vs. Marshall*, 1 Chester Co., 18.

IX. NEGLECT TO REMOVE TAINT OF. 1. If the taint of usury attaches at the inception of a money transaction, it cannot afterwards be eradicated by any device known to man, nor by the substitution of new securities as long as the original debt survives. *Boyd vs. Seybert*, 25 Pittsburg Journal, 22. *Miller vs. Irwin*, *Idem*, 167. 2. The taint of usury cannot be eradicated by the substitution of one security, or one set of securities, for another, so long as the original debt survives. *Miller vs. Irwin*, 85 Pa., 376. 3. Neither the renewal of an old nor the substitution of a new security between the same parties can validate an usurious contract. *Riegel's Estate*, 16 Phila., 388.

X. NEGLECT TO SET UP A DEFENCE. 1. The defence of excessive interest cannot be set up collaterally to a judgment entered by confession. *Montague vs. McDowell*, 3 York Record, 9. 2. The defence of usury against one obligation cannot be set up against an action upon an entirely distinct and independent obligation, even if it be between the same parties. *Taylor vs. Bresch*, 35 Pittsburg Journal, 255.

V

Vendor and Vendee.

I. NEGLECT TO ACCEPT GOODS SOLD. 1. In an action by vendor against vendee, for refusing to receive goods sold, the measure of damages is the difference between the price agreed to be paid, and the cost of the articles to the vendor. The vendor, by his actions, may release the vendee from his obligation to take the goods. *Allegheny Valley R. R. vs. Steele*, 11 W. N., 113. 2. A vendee cannot be made to pay for goods which he has refused to accept, unless his order has been strictly fulfilled. *Clark vs. Wright*, 5 Phila., 439. 3. An order from a seller to a carrier to collect on delivery, is a mere provision for the retention of the seller's lien; if accepted, it creates a contract between the seller and carrier, on breach of which by the latter, the seller may recover the price from him. The vendor's right to recover the price from the vendee who has bought the goods but refuses to accept them, is as complete as if he had taken them without payment. *Comm. vs. Fleming*, 130 Pa., 138. 4. Where the vendee, without sufficient cause, refuses to accept the goods sold, the title remains in the seller, and the measure of damages for the refusal to accept is not the purchase price of the goods, but the difference between the price agreed upon and the market value on the day appointed for delivery. *Jones vs. Jennings*, 168 Pa., 493. 5. On a refusal by a vendee to accept goods sold him, the measure of damages is the difference between the contract and the market price at the time of refusal. *Laubach vs. Laubach*, 73 Pa., 387. 6. When the purchaser refuses to accept and pay for the goods sold him, the measure of damages is the difference between the value of the thing sold and the price agreed on. Refusal to receive is an excuse for a failure

Vendor and Vendee—Continued.

to deliver goods sold. *Schnelby vs. Shirtcliff*, 7 Phila., 236. 7. Where a vendee of goods subsequently notifies the vendor not to ship them, such notice is a revocation of the carrier's agency to receive the goods, and a subsequent delivery to the carrier will not charge the vendee with their price, his only liability being for damages for refusing to accept them. *Unexcelled Fire Works Co. vs. Polites*, 130 Pa., 536.

II. NEGLECT TO OBJECT TO AN ACCOUNT. Where a seller renders to the buyer an account of the goods sold and delivered, the buyer must object within a reasonable time, otherwise he presumably admits the items of the account. *Ahl's Appeal*, 129 Pa., 26.

III. NEGLECT TO ASCERTAIN AMOUNT AND PRICE. When something remains to be done between the vendor and vendee to ascertain the amount and price of the article, the property and risk remain in the vendor. *Nicholson vs. Taylor*, 31 Pa., 131.

IV. NEGLECT BY ALTERING BILL OF SALE. Where the vendee wilfully alters a bill of sale, for the purpose of covering property from execution, such altered instrument is not evidence to go to the jury. *Babb vs. Clemson*, 10 S. & R., 419.

V. NEGLECT TO COMPLETE SALE. If a vendee obtain possession of goods, without complying with the conditions of sale, the vendor should immediately reclaim them; but if he lie by, and make no complaint in a reasonable time, he consents to the absolute transfer of the property. *Backentoss vs. Speicher*, 31 Pa., 324.

VI. NEGLECT OF CONSIDERATION. 1. Sale means a contract to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought. *Bigley vs. Risher*, 63 Pa., 155. 2. To sustain an action to recover back purchase money on the ground of fraud, there must be an actual rescission by the party defrauded, notice of it to the other party, and, unless the subject be utterly worthless, an offer to return it, so as to put the vendor *in statu quo*. *Morrow vs. Rees*, 69 Pa., 368.

Vendor and Vendee—Continued.

VII. NEGLECT TO CONSUMMATE SALE. 1. In the case of conditional sale, if the buyer disapprove, he must make known his disapproval in due season, or the contract will bind him. *Hickman vs. Shimp*, 2 **Chester Co.**, 445. 2. To enable vendors of goods to rescind a sale, there must have been artifice, trick or false representations made to induce the sale. *Labe vs. Bremer*, 167 **Pa.**, 15.

VIII. NEGLECT TO PREPARE DEED. It would seem that the seller, having agreed to convey, should prepare the deed of conveyance, for this is the substance of the agreement. The title deeds are in his possession, without which a conveyance cannot be drawn. *Sweitzer vs. Hummel*, 3 **S. & R.**, 230.

IX. NEGLECT TO DELIVER POSSESSION. 1. The rule governing sales of personal property, that retention by the vendor is fraud as matter of law, does not apply to sales of real estate, the title to which is governed by the conveyance as its index, and not by the possession; but fraud in the conveyance of real estate is for the jury to determine as a question of fact. *Allentown Bank vs. Beck*, 49 **Pa.**, 394. 2. Actual change of possession must accompany a voluntary sale of chattels, and the possession must continue in the purchaser. Otherwise the sale is fraudulent *per se*. The burden of proving delivery lies on the purchaser. A temporary change and early return of the property into the hands of the vendor leaves it exposed to executions; a merely formal or constructive delivery will not defeat them. *Barr vs. Reitz*, 53 **Pa.**, 256. 3. Delivery of the keys of a safe sold and of the key of the premises where the safe stood, without removal of the safe sufficed to pass the property under the circumstance. *Benford vs. Schell*, 55 **Pa.**, 393. 4. The general rule is, that on failure to deliver according to contract, the vendee has a right to supply himself in the market, and the measure of damages will be the difference between the necessary cost of the article and the contract price. *Billmeyer vs. Wagner*, 91 **Pa.**, 95. 5. An actual and continued change of possession is essential to the validity of a sale as against creditors. If the vendor retains pos-

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session or the delivery is merely formal or constructive, the sale is fraudulent in law, without reference to the intent of the parties. *Billingsley vs. White*, 59 Pa., 464. 6. Where the plaintiff in an execution buys at public sale the personal property of the defendant, he may leave the goods in the possession of the defendant without thereby making them subject to the latter's debts. A change of possession is not necessary to give validity to a judicial sale. *Bisbing vs. Bank*, 93 Pa., 79. 7. Where the vendor, without fraud on his part, cannot make title, the vendee is not entitled to damages for the loss of his bargain, beyond the money paid, with interest and expenses. But where the vendor is guilty of collusion, tort, artifice and fraud to escape from a bad bargain, the vendee is entitled to damages arising from the loss of the bargain. *Bitner vs. Brough*, 11 Pa., 127. 8. Delivery of the personal property must accompany the sale in Pennsylvania, or it will be fraudulent as to creditors of the vendor. If retained after sale, it is not only evidence of fraud, but fraud *per se*. Some exceptions exist to this rule. *Born vs. Shaw*, 29 Pa., 288. 9. A voluntarily sale of personal property, unaccompanied by an actual delivery of possession to the vendee, is fraudulent and void as against creditors. A symbolical or a merely formal delivery will not answer. Nor will concurrent possession by the vendor and vendee protect the property. *Brawn vs. Keller*, 43 Pa., 106. 10. A delivery of personal property on credit, at stipulated prices, to be paid for by instalments, under a written agreement that the goods shall remain the property of the vendor until paid for, is a sale, not a bailment, and a *bona fide* purchaser from the vendee, without notice of the agreement, takes a good title as against the vendor. Creditors of the vendee may seize and sell the same for the payment of his debts. *Brunswick vs. Hoover*, 10 W. N., 219. *Stadfeld vs. Huntsman, Idem*, 216. 11. Where the sale of personal property, reasonably susceptible of delivery, is not accompanied by a transfer of the actual possession, although valid and binding as between the parties, it is a fraud *per se* as

Vendor and Vendee—Continued.

to creditors, and *bona fide* subsequent purchasers, without regard to the intent of the parties, and the question, where the fact is established, is for the court, and not for the jury. Where the property is not reasonably capable of actual delivery, it is only necessary that the vendee should assume the control of the property, so as to indicate to all concerned the fact of the change of ownership. *Buckley vs. Duff*, 114 Pa., 596.

12. Where a purchase is made in good faith and for a valuable consideration, followed by acts intended to transfer the possession as well as the title, and the vendee assumes such control of the property as to reasonably indicate a change of ownership, the delivery of possession as a matter of law cannot be declared insufficient. *Buffalo Hardware Co. vs. Hackenberg*, 29 W. N., 81.

13. A change of the location is not in all cases necessary to constitute a valid delivery of a chattel as against creditors. Due regard must be had to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property. The vendee must assume such control of the property as to reasonably indicate a change of ownership. *Cessna vs. Nimick*, 113 Pa., 70. *Ayers vs. McCandless*, 147 Pa., 49.

14. What constitutes sufficient change of possession to perfect a sale of chattels, has been a fruitful cause of litigation. If possible, the delivery must be actual. If the nature and bulk of the article preclude this, then it must be constructive. In every case, every species of divestiture which can give the world notice should be resorted to. *Chase vs. Ralston*, 30 Pa., 539.

15. The retention of the possession of goods by a vendor is fraudulent *per se* and void against creditors. *Clow vs. Woods*, 5 S. & R., 275. *Mitchell vs. Willock*, 2 W. & S., 254.

16. It is settled law, that a sale of personal property passes the title as between vendor and vendee, when such property has been designated and set apart by the former. Actual delivery, weighing and setting aside the goods, are only circumstances from which the intention may be inferred as matter of fact. *Comm. vs. Hess*, 148 Pa., 108.

17. Retention of

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possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud, the sale being the act of the law, not of the person retaining. A chattel purchased at judicial sale may be left with the former owner on a contract of bailment. *Craig's Appeal*, 77 Pa., 448. 18. It is essential in order to a valid sale of personal property, as against creditors of the vendor, that it must be removed from the premises of the vendor, or he from the possession of the goods. *Craver vs. Miller*, 65 Pa., 456. 19. As a general rule, a sale of personal property is not good against the creditors of the vendor, unless possession be delivered by the vendor in accordance with the sale. As to the kind of possession necessary to be given, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. A change in the location of the property is not always essential. *Crawford vs. Davis*, 99 Pa., 576. 20. Where the vendor himself has not the possession of the chattel, or the right of possession, it is clear he cannot be required to deliver it. In such case, no actual delivery of possession is necessary to make a transfer good as against the creditors of the vendor. *Creps vs. Dunham*, 69 Pa., 460. 21. A vendee permitting a vendor to remain in possession, enables the vendor to commit a fraud on innocent third persons, and the vendee must bear the loss. In such case *caveat emptor* does not apply. The rule of law is, that the retention of personal property by the vendor is a colorable sale. If, in such case, the vendor sells the goods to a *bona fide* purchaser for value without notice, the purchaser can hold the goods. *Davis vs. Bigler*, 62 Pa., 242. 22. A sale of personal chattels, unaccompanied by possession, is fraudulent in law, and void as to creditors of the vendor; and the question is of law for the court, and not of fact for the jury. *Dewart vs. Clement*, 48 Pa., 413. 23. When goods are purchased at private sale, the vendee should take and retain possession; otherwise the contract may be presumed fraudulent against creditors of the vendor. But one who buys

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personal property at sheriff's sale, may safely leave it with the defendant in the execution, under a contract of bailment. *Dick vs. Cooper*, 24 Pa., 217. 24. Where goods are purchased at private sale, it must be shown that the vendee took and kept possession of them, or the contract is presumed fraudulent as to creditors of the vendor. But where one buys property at a public, judicial sale, he may leave it with the defendant in execution, without making it liable to be taken under another execution. *Dick vs. Lindsay*, 2 Grant, 431. 25. Although a sale of goods unaccompanied by a delivery of possession, is in law fraudulent and void as to creditors existing when it is made, yet as to subsequent creditors it is fraudulent only as to those in fact intended to be defrauded. *Ditman vs. Rawle*, 124 Pa., 225. 26. An actual and contemporaneous change of possession is required to make a sale of personal property good against creditors. *Echfeldt vs. Frick*, 3 Phila., 116. 27. To render a sale of personal property valid as against creditors of the vendor, the change of possession must be all that could reasonably be expected, taking into view the character and situation of the property, and the relation of the parties. *Evans vs. Scott*, 89 Pa., 136. *Renninger vs. Spatz*, 128 Pa., 524. 28. To constitute the sale of personal property, there must be a transfer of the title. Delivery, either actual or constructive, is an essential ingredient to a sale of personal property. An agreement to sell is only executory until the contract is completed by delivery. *Garbracht vs. Comm.*, 96 Pa., 449. 29. That a sale of chattels may be good against creditors, they must either pass to the vendee, or the vendor must pass away from them, leaving them in the exclusive possession of the vendee. The transfer must be actual, continuing and exclusive in the vendee. If the delivery of possession be but temporary and followed by a return to the vendor, the sale is colorable and fraudulent. *Gannan vs. Cooper*, 72 Pa., 32. 30. There are many instances, in which from the necessity of the case there can be only a constructive delivery of personal property. A change in the location of

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property is not always necessary, nor even practicable. Due regard must be had to the character of the property, its intended use, the nature of the transaction, position of the parties, etc. *Garretson vs. Hackenburg*, 144 Pa., 113.

31. Where personal property sold is not reasonably susceptible of actual delivery, a constructive delivery is sufficient, and it is not necessary that the vendee should do more than assume such control of it as to reasonably indicate the fact of the change of ownership. *Goddard vs. Weil*, 165 Pa., 419.

32. A vendor's continuance in possession of personal property is a badge of fraud, even if it be not a fraud *per se*. *Hartman vs. Diller*, 62 Pa., 37.

33. In every sale of personal property, there must be such a delivery and change of possession attending the transfer as the nature of the property is capable of, followed by removal and actual possession, as soon as the bulk and condition of the thing and the circumstances of the case will permit. *Haynes vs. Hunsicker*, 26 Pa., 58. *Dunlap vs. Bournonville*, *Idem*, 72.

34. A sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase money be paid, is fraudulent and void as respects creditors of the vendee, and they may levy upon and sell the property for the payment of the vendee's debts. *Heppe vs. Speakman*, 3 Brewster, 548.

35. In order to pass title to personal property, where the rights of creditors are concerned, the sale must be *bona fide*, for a sufficient consideration, and followed by open, notorious, visible, actual and continued possession. *Hinton vs. Curtis*, 1 Pittsburg, 99.

36. To render a bill of sale of goods valid as against creditors, there must be an accompanying, actual, visible and notorious possession in the vendee. *Hoopsmith vs. Cope*, 6 Wh., 53.

37. If a sale of a store of goods is not in fact fraudulent, it will not be declared so in law for want of an open change of possession, if there has been an actual formal delivery of possession. *Hugus vs. Robinson*, 24 Pa., 9.

38. Fraud in the sale of chattels is a question of law for the court. Where the owner of a mule sold him to a person who

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immediately left him in the possession of the vendor, held, that no title passed to the purchaser as against creditors of the vendor. *Leech vs. Shantz*, 2 Phila., 310. 39. Delivery is not necessary to pass the title to an absent article, but specification is an indispensable requisite. A voluntary sale of personal property unaccompanied by actual delivery of the possession to the vendee, is fraudulent and void as against creditors. A symbolical or a merely formal delivery will not answer. Concurrent possession by the vendor and vendee is insufficient. *Leonard vs. Winslow*, 2 Grant, 139. *Clow vs. Woods*, 5 S. & R., 275. *Babb vs. Clemesen*, 10 S. & R., 419. *Baum vs. Keller*, 3 Grant, 145. 40. It is well settled, that a sale of personal property, not in the possession of the vendor, but in the hands of a bailee, is good against an execution creditor of the vendor, though there be no actual delivery. *Lewis vs. Havard*, 1 Chester Co., 189. 41. A sale of personal property in the hands of a bailee, is good as against an execution creditor, though there be no actual delivery, if the vender does not retake possession. *Linton vs. Butz*, 7 Pa., 89. 42. In a sale of personal property, the general rule is that it must be accompanied by a change of possession. But some kinds of property, such as lumber, are not susceptible of immediate manual delivery, and the law requires only such a delivery and change of possession as the nature of the property will allow. *Long vs. Knapp*, 54 Pa., 514. 43. A symbolical, constructive or temporary delivery of personal property is not sufficient to change the ownership as to creditors; there must be actual delivery at the time of the transfer, and continuing possession; otherwise, the sale, although *bona fide* as between the parties, is fraudulent in law. *McBride vs. McClelland*, 6 W. & S., 94. 44. The rule of the common law prevails in Pennsylvania, by which a sale of personal property, unaccompanied by delivery of possession, is void as against the intervening rights of purchasers and creditors. *McCabe vs. Blymyre*, 9 Phila., 615. 45. As a general rule, a sale of personal property is not valid as against the creditors of the vendor, unless possession be

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given by the vendor. *McClure vs. Forney*, 107 Pa., 414. 46. Where a purchase was made in good faith, for a valuable consideration, followed by acts intended to transfer the possession as well as the title, and the vendee assumed such control as reasonably to indicate a change of ownership, the delivery cannot be held insufficient, as a matter of law. Retention of possession by a debtor of property sold as his property at sheriff's sale, is not of itself a badge of fraud; nor does leaving the property with debtor of itself warrant the inference that the purchaser either sold or gave it to him, so as to authorize its seizure again as the debtor's property. *McGuire vs. James*, 143 Pa., 521. *Stoddart vs. Price, Idem*, 537. 47. The retention of possession by the vendor of chattels is a fraud in law whenever they are capable of delivery, and no honest and fair reason can be given for the vendor not giving up possession to the vendee. Whenever the subject of the sale is capable of actual delivery, it must accompany and follow the sale. When the subject of the sale precludes actual delivery, a constructive delivery will suffice. The possession of the chattels by the vendee must be exclusive of the vendor. A concurrent possession would indicate no actual change. Where there has been a sufficient delivery, and the vendee is in possession, the fact that the vendor is employed about the establishment in a capacity holding out no *indicia* of ownership is not such a concurrent ownership as the law condemns. *McKibbin vs. Martin*, 64 Pa., 352. 48. Where there has been an actual and continued change of possession, the court cannot pronounce the sale fraudulent in law. The vendor must make such an actual delivery only as the nature of the property and circumstances of the case will reasonably admit. The separation of the property from the possession of the vendor must be at the time of the sale, or within a reasonable time afterwards. The separation may be made by the vendee's surrender and transfer of his power and control over it to the vendee. *McMarlan vs. English*, 74 Pa., 296. 49. In order to render a sale of goods valid against creditors, the change of possession

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must be both actual and continued. A concurrent possession will not suffice; especially where there is no apparent change in the conduct of the business. *Miller vs. Gannan*, 69 Pa., 134. 2 Legal Opinion, 53. 50. Where in a sale of personal property, the possession does not follow and accompany the transfer, it is a fraud in law without regard to the intent of the parties, and it is a question for the court, and not for the jury. *Milne vs. Henry*, 40 Pa., 352. 51. A vendor of goods has a right to retain them in his own possession, until the price has been paid. If he sells upon credit the lien of the vendor is gone, and he must depend upon the ultimate solvency of his customer at the expiration of the term of credit. If, while the goods are in the hands of a carrier, in transit, or in store at the end of the journey, with no intervening right in the way, the buyer becomes insolvent, the vendor may resume possession of the goods. *Penna. R. R. vs. Oil Works*, 126 Pa., 493. 24 W. N., 88. 52. Where there is a contract for the sale of a chattel or chose in action, actual delivery is not necessary to perfect the title of the vendee. The property passes whenever the terms of the contract are settled, and the subject-matter ascertained and set apart. A gift is revocable by the donor till delivery. *Pringle vs. Pringle*, 59 Pa., 281. 53. To render a sale of personal property valid as against creditors, there must be an actual delivery. If the property remains in the possession of the vendor, it is subject to levy and sale for his debts. *Racine Wagon Co. vs. Throop*, 1 Lackawanna Jurist, 47. 54. Where a vendor of personal property keeps possession of the property after the sale of the same as before, no title will pass as against the creditors of the vendor, where the property is capable of delivery. *Rex vs. Jones*, 6 Pa. County, 401. 55. Where a merchant failed to deliver goods purchased, at the destination agreed upon, and sold the identical goods to a third party, the measure of damages is the price of the goods at the port of destination, less the invoice price, expenses, costs and charge of transportation. *Schmertz vs. Dwyer*, 53 Pa., 335.

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56. Property in a chattel is not changed by a sale and delivery, on conditions to be afterwards fixed and performed, but which are not performed. *Scott vs. Wells*, 6 W. & S., 357.

57. No presumption of fraud arises from the retention of chattels by the defendant in an execution after a sheriff's sale. There is a distinction between judicial and private sales in this respect. *Sharp vs. Publishing Co.*, 2 Pa. County, 620.

58. Where a sale of chattels is not followed by change of possession, but the goods remain precisely as before the sale, it is for the jury to say whether the sale was *bona fide* and honest, considering the nature of the property and the relations of the parties. *Sauerwein vs. Costigan*, 17 Phila., 246. *Woods vs. Hull*, 1 W. N., 442. *Snyder vs. Shuk*, 11 W. N., 136. *Shelden vs. Sharpless*, 2 W. N., 311.

59. In an action by the vendee to recover damages for the non-performance of a contract for the sale and delivery of goods at the market price upon which he had made payments in advance, he cannot recover estimated profits. *Sherman vs. Roberts*, 1 Grant, 261.

60. Upon a sale of personal property, only such delivery is required as the nature of the property is susceptible of. As a general rule, there cannot be concurrent possession of the vendor and vendee of a chattel which is susceptible of actual delivery. The purchaser at sheriff's or constable's sale may leave the goods in the possession of the defendant in the execution, under any lawful contract of bailment. *Smith vs. Crisman*, 91 Pa., 428.

61. It is not essential to the validity of a voluntary sale of household furniture, that possession should be immediately taken by the purchaser. *Smith vs. Stern*, 17 Pa., 360.

62. To constitute a valid sale of personal property against execution creditors, the general rule is, that there must be a delivery accompanied by a continuing possession in the vendee. *Steele vs. Miller*, 33 Pittsburgh Journal, 173. 63. To constitute a valid sale of personal chattels, as against the creditors of a vendor, the delivery of possession must be actual if possible, or if the nature and bulk of the articles preclude, it must be constructive. A mere bill of sale of his furniture by

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a son-in-law, when in failing circumstances, to his father-in-law, who resided in the same house, and who transferred it to his daughter, is not the actual delivery and change of the possession of the property required by the law to be valid against creditors. *Steelwagon vs. Jeffries*, 44 Pa., 407. 64. While, as a general rule, the transfer of property on the sale of a chattel is effected by the transfer of the chattel itself to the possession of the purchaser, yet the parties may modify it within certain limits by their contracts. But when the terms are prejudicial to others, and, by giving to the vendor a deceptive appearance of ownership and a false credit, are calculated to mislead the public, they will be held to be void, as to those injuriously affected by them. *Stephens vs. Gifford*, 137 Pa., 219. 65. A transfer of personal property, unaccompanied by a corresponding change of possession, is void as against creditors. The reason of the rule is, that the possession of personal property is *prima facie* evidence of ownership, and the possessor acquires a credit on account of it. A sale made, however, by the sheriff, of property taken in execution, forms an exception to this rule. It is made upon judicial process, after public notice given, and is presumed to be fair. *Streeper vs. Eckart*, 2 Wh., 306. 66. In an action to recover damages for a failure to deliver goods purchased, the measure of damages is the difference between the contract price and the real price at which one obtained the goods to fill the orders intended to have been filled by the goods which defendant agreed to deliver. *Theis vs. Weiss*, 166 Pa., 9. 67. Whatever the form of an agreement for the change of possession of goods, if its purpose is to cover up a sale and preserve a lien in the vendor for the price of goods, as by a pretended consignment, it is void as respects creditors. *Thompson vs. Paret*, 94 Pa., 275. 68. Fraudulent retention of possession avoids a contract of sale only as to creditors or purchasers. *Vandyke vs. Christ*, 7 W. & S., 374. 69. Such change of possession must accompany the sale of personal property, as the nature of the property allows. *Van Loon vs. Bachman*,

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5 Luzerne Register, 231. 70. Personal property bought at a judicial sale, may be left with the defendant; it may be hired or loaned with safety; but if sold or given, the purchaser parts with his title, and cannot maintain trespass against anybody for taking the property. It may be left with the defendant under such a contract of bailment, as would in law protect it from the bailee's creditors, as if he had never been the owner of it. Where the purchaser at sheriff's sale afterwards sells them to the wife of the defendant in the execution, and released possession, he has no lien for unpaid purchase money. *Waldron vs. Haupt*, 52 Pa., 408. 71. A sale of personal property in the hands of a bailee is good against an execution creditor, without delivery of possession. *Weldon vs. Miller*, 2 Northampton Co., 143. 72. Exclusive possession in a vendee, by parol, is necessary to the perfection of his title. *Wible vs. Wible*, 1 Grant, 406. 73. On failure to deliver specific articles contracted for, the damages are generally the difference between the contract price and the market price at the time for delivery. When the contract is to pay a sum of money in specified articles, the damages on failure are the interest of the money. *White vs. Tompkins*, 52 Pa., 363. 74. The familiar rule, that an assignment to be good against creditors of the assignor must be accompanied by a delivery of possession, refers to visible, tangible property. *Widdall vs. Garsed*, 125 Pa., 358. 75. A creditor after buying his debtor's property at an open, public, and *bona fide* sale may lawfully give it to any member of a debtor's family. *Winch vs. James*, 68 Pa., 297. 76. Where the control and use of goods by vendor and vendee are so confused and mixed as to leave the question of possession uncertain, the sale, however honest, cannot be sustained. A sale of goods in the hands of a bailee is good against an execution creditor, if the vendor does not retake possession. *Worman vs. Kramer*, 73 Pa., 378. 77. Where the possession does not follow as well as accompany a transfer of goods, it is fraud in law, without regard to the intent of the parties, and becomes a question for the court,

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and not for the jury. *Young vs. McClure*, 2 W. & S., 147. *Forsyth vs. Watkins*, 14 Pa., 103. *Cadbury vs. Nolen*, 5 Pa., 324. 78. Upon the sale of goods, the purchaser should take possession exclusive of the vendor. A concurrent holding of the possession by the parties is fraudulent as to the creditors of the vendor, and hence void ; but it is not concurrent possession if the vendor remains in the store as clerk or merely has desk room there. *Ziegler vs. Handrick*, 106 Pa., 87.

X. NEGLECT TO DESIGNATE GOODS SOLD. Before any property in goods sold can pass, they must be ascertained, designated and separated from the stock or quantity with which they are mixed. *Haldeman vs. Duncan*, 51 Pa., 66.

XI. NEGLECT OF VENDEE TO EXAMINE PROPERTY. Where the owner of real estate advertised the property for sale and added the phrase: "Parties negotiating for purchase are required to examine the foregoing statement, and exercise their own judgment as to its correctness," it is negligence in the purchaser not to make further examination, for an advertisement is not like a representation of fact made directly to a purchaser. *Wallace vs. Hussey*, 63 Pa., 24.

XII. NEGLECT OF VENDOR OF GOOD-WILL. 1. An agreement in restraint of trade should be established by clear evidence as to its terms and consideration. Good faith requires of a party who has sold the good-will of his business, that he should do nothing which tends to deprive the purchaser of its benefits and advantages. The vendor has no right to advertise that he has removed from his former place of business to another place, where he will continue his former occupation. *Hall's Appeal*, 60 Pa., 458. 2. A contract for the sale of a good-will does not, in itself, involve any obligation on the vendor not to exercise the same trade. If the vendee wishes to protect himself from such a contingency, he should do it by an agreement. *Palmer vs. Graham*, 1 Parsons, 476.

XIII. NEGLECT OF INQUIRY. Whatever puts a party upon inquiry amounts to notice, provided that inquiry becomes a duty, and would lead to the knowledge of the requisite fact,

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by the exertion of ordinary diligence and understanding. A loss incurred from ignorance shall be borne by him who had reason to suspect, yet refused to investigate. *Lodge vs. Simon-ton*, 2 P. & W., 439.

XIV. NEGLECT IN INSPECTION OF GOODS. To the purchase of goods on inspection, the rule of law is *caveat emptor*. If, however, the article be such that the vendor presumably has superior knowledge in regard to, there is a warranty that it shall be in kind as represented. *Lord vs. Grow*, 39 Pa., 88.

XV. NEGLECT IN THE SALE OF LAND. Where a sale of land has been induced by the false and fraudulent representations of the vendor, the vendee must first tender a reconveyance before he can recover the price paid. The vendee is chargeable with reasonable care of the property in his possession, although the sale was fraudulent. *Pearsoll vs. Chapin*, 44 Pa., 9.

XVI. NEGLECT BY RESERVING LIEN ON GOODS. Where delivery of exclusive possession of goods accompanies an absolute or conditional sale, a reservation of lien or right of property in the vendor will not protect the property from the vendee's creditors. *Eurwer vs. Van Giesen*, 6 W. N., 363. *Becker vs. Smith*, 59 Pa., 469.

XVII. NEGLECT OF NOTICE OF SALE OF BUSINESS. Where a person sells his business to another, who continues the business at the same stand and with the same employees, actual notice should be given to all persons who had previous dealings there. *Shaunce vs. McCrystal*, 162 Pa., 457.

XVIII. NEGLECT TO PART WITH OWNERSHIP OF GOODS. There is no principle of law better settled in Pennsylvania, than that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase money is paid, will enable creditors of the vendee to seize and sell the same for the payment of his debts. *Brunswick Co. vs. Hoover*, 95 Pa., 508.

XIX. NEGLECT TO PAY FOR GOODS. 1. If, on a sale for cash the vendee removes the goods without payment, the vendor

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should immediately retake them, using even force, if necessary. By making no immediate complaint, he consents to the transfer. *Bowen vs. Burk*, 13 Pa., 146. 2. The right of a vendor to arrest goods sold, while they are *in transitu* to the vendee, is a right eminently favored by the law. The vendor may resume his possession by any means not criminal, while the property is in transit. No intervening attachment or execution against the vendee will defeat the right. *Cabeen vs. Campbell*, 30 Pa., 258. 3. A purchaser of personal property, in full possession thereof, cannot refuse to pay for it, because a third party has asserted a superior title, and threatened to bring suit for the recovery of the property or its value. *Geist vs. Stier*, 134 Pa., 224. 4. It is incumbent on the vendee to remove all doubt of fairness, even if possession accompanied the transfer. The sale of all a vendor's goods pending a suit against him, is a mark of fraud. *Redfield vs. Dysart*, 62 Pa., 62. 5. When goods are sold for cash and the vendor delivers the goods and immediately demands the cash, which the vendee refuses to pay, such delivery is not an absolute but a conditional delivery, and no property in the goods passes. *Refining Co. vs. Miller*, 7 Phila., 97. 6. Ordinarily where there has been a conditional sale, accompanied by a delivery of possession to the vendee, without payment of the price to the vendor, a sale thereof by the vendee to a *bona fide* purchaser, without notice, is good. *Stewart vs. Welch*, 2 Luzerne Register, 121.

XX. NEGLECT TO PAY INTEREST. Interest will not be due, where a vendor harasses a vendee in his possession, or is guilty of vexatious delay or gross laches, or there are strong doubts of the title. *Kester vs. Rochel*, 2 W. & S., 368.

XXI. NEGLECT IN THE MODE OF PAYMENT. Where a creditor employed an agent to buy a horse of his debtor, as if for the agent himself, and the agent did so, paying a small sum in cash on account, received the horse, for the creditor, and a few days later offered the vendor the creditor's claim for the balance, which the debtor refused to accept, held, that the

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transaction was a fraud, and that no title to the horse passed, but the debtor could recover in replevin. *Harner vs. Fisher*, 58 Pa., 423.

XXII. NEGLECT TO TENDER PAYMENT. The general rule of common law is, that when no time or place is fixed by the contract for the payment or delivery of specific property, there must be a tender within a reasonable time to pay or deliver. If no place be fixed, the obligor must seek the creditor, if within the state, and offer to perform the stipulation, and if the property is portable, it must be taken to the creditor or to his residence and be delivered. If the property be ponderous, he must call upon the creditor and ask him to appoint a time and place to receive it. *Roberts vs. Beatty*, 2 P. & W., 63.

XXIII. NEGLECT OF RIGHT OF POSSESSION. A sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase money is paid, is fraudulent and void as to the creditors of the vendee and innocent purchasers. Yet there are exceptions to the rule, that possession must accompany the ownership of chattels. There are certain lawful contracts of lending and hiring by which the owner parts with the possession, and yet fraud cannot be presumed. *Martin vs. Matheot*, 14 S. & R., 214. *Stadtfeld vs. Huntsman*, 92 Pa., 55.

XXIV. NEGLECT OF THE PROPERTY. 1. If a vendor contracts to convey real estate to another, at a future day, for a certain price, and afterwards, before the date of conveyance, alters the state of the property so as materially to lessen its value, the vendee may rescind the contract. If he has paid a part of the purchase money, he may recover it. *Borough of Erie vs. Vincent*, 8 W., 510. 2. Delivery of personal property is not necessary to the vesting of the title; it is only evidence of it. After a contract of sale is completed, the risk of the property from accident, as between the parties, is in the purchaser, where there has been no wrongful detention or carelessness in keeping it on the part of the seller; but if the loss

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occurs before the contract is completed, it must be borne by the seller. *McCandlish vs. Newman*, 22 Pa., 460.

XXV. NEGLIGENCE IN QUALITY OF GOODS. 1. If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the purpose. It is otherwise, when the buyer purchases on his own judgment. *Chester Steel Castings Co. vs. Brownscombe*, 7 Kulp, 136. *Isaacs vs. Marks*, 1 W. N., 268. 2. In an action upon a book account for goods sold from time to time, where general payments had been made on account, defendant is not precluded by reason of such payments from showing bad workmanship and defective materials as to any of the items of the account. *Chester Tube Co. vs. Whittington*, 94 Pa., 139. 3. In executory contracts for the sale of personalty, there is a warranty implied, as part of the contract, that the goods shall be of the kind ordered, and of merchantable quality. In such sales, if the goods be not of such kind and quality, the buyer is under no obligation to accept them. It is not the buyer's duty to visit the place of delivery to the carrier, in order to inspect the goods before shipment. If the goods are not such as are required by the contract, the seller can neither recover from the buyer the expenses of shipment nor the purchase money. *Fogel vs. Brubaker*, 122 Pa., 7. 4. A vendor of goods is not answerable for their quality, unless he has expressly warranted them, or has been guilty of fraudulent representations or affirmation of a quality known to be false. *Houston vs. Cook*, 153 Pa., 43. 5. In an executed sale of personal property, there is no implied warranty of quality. There are two cases in which the vendor may become liable to the purchaser for defects of quality: where his representations amount to deceit, where he warrants the quality. *McNeal vs. Banks*, 6 Kulp, 371. 6. The old rule of the civil law, that a sound price entitled the buyer to a sound article, has been repudiated by the common law. *Matthew vs. Hartson*, 3 Pittsburg, 86.

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7. Where goods are sold by sample there is no implied warranty of the quality. The risk is that of the purchaser, and the doctrine of *caveat emptor* applies, in the absence of fraud or circumstances to indicate that the sample was to be taken as a standard of quality. The sample becomes a guarantee only that the article to be delivered shall follow its kind, and be only merchantable. *Sims vs. Stribler*, 13 W. N., 92.

8. In an ordinary contract of sale of personal property, the vendor is subject to no implication of a warranty of the quality of the article sold. *Warren vs. Coal Co.*, 83 Pa., 439.

XXVI. NEGLECT TO REMOVE GOODS. Where goods are sold at auction on a credit, and the vendee afterwards refuses to take them, the owner, before the expiration of the credit, may sue the vendee for breach of contract; in which the measure of damages usually is the difference between the price agreed to be paid and their price at the date of refusal to accept them. This may be ascertained by a resale at the risk of the vendee, but the jury are not bound by this mode. *Girard vs. Taggart*, 5 S. & R., 19, 539.

XXVII. NEGLECT IN REPRESENTATIONS. 1. Where a sale of personal property was made as the result of statements made by the vendor, which were false in fact, his belief that they were true is of no weight, and does not preclude the vendee from showing their falsity. The vendor in making the representations, was bound not merely to believe, but to know they were true. *Bower vs. Fenn*, 90 Pa., 359. 2. If the vendor of goods does not rely on fraudulent representations made by the vendee, and does not part with his goods on the faith of them, he cannot rescind the contract of sale on the ground of fraud. *Boyd vs. Sheffer*, 156 Pa., 100. 3. An intention of an insolvent buyer at the time of the purchase not to pay, will not amount to a fraud, unless some false representation, trick or artifice be added. *Bughman vs. Bank*, 159 Pa., 94. 4. Insolvency of the purchaser of goods, and his knowledge of it, coupled with a representation of solvency, which induced the seller to part with possession of the property, will

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enable the latter to rescind the sale and recover possession of the property. *Cincinnati Cooperage Co. vs. Gaul*, 170 Pa., 545.

5. To support an action for deceit in the sale of goods, the plaintiff must show the falsity of the representations; that the defendant knew they were false; that they were calculated to induce the plaintiff to purchase, and that he, believing them, did purchase. *Cox vs. Highley*, 100 Pa., 252.

6. Where a party makes false representations of his solvency to induce credit, though he believed them to be true, he is not liable to an action of deceit, and the state of his belief is a question for the jury. *Dilworth vs. Bradner*, 85 Pa., 238.

7. A sale of goods procured by a vendee by false representations as to his solvency, is a voidable contract which the vendor, upon discovery of the fraud, may rescind, but he cannot retain any advantage obtained by the sale, and at the same time annul it. *Dornan vs. Shiffer*, 10 Lancaster Review, 242. 2 Lackawanna Jurist, 350.

8. If a party make erroneous representations of the solvency of another, he will not be liable in an action of deceit for such representations, if at the time he made them he honestly believed them true. *Duff vs. Williams*, 85 Pa., 490.

9. A mere misstatement by the buyer of his motive in purchasing, or in stating the value of the article purchased, is not a case in which equity will grant relief, if the vendor had opportunities of investigating the truth of the statements, and relied on his own judgment rather than on the representation of the vendee. *Edelman vs. Latshraw*, 9 Montgomery Co., 83.

10 *Idem*, 59.

10. To enable a seller of goods to rescind a contract on account of false statements made by the buyer, it is not necessary that the statements be such as would necessarily convict him in a criminal court. *Eastern Lumber Co. vs. Gill*, 9 Pa. County, 630.

11. Undoubtedly a vendor may praise to the most extravagant extent qualities which are susceptible of inspection; but the misrepresentation of an occult quality in regard to which the vendee is not supposed to buy on his own judgment, would be followed by very decisive consequences. *Fisher vs. Worrall*, 5 W. & S., 578. *Clark vs.*

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Everhart, 63 Pa., 350. 12. The vendor of chattels impliedly warrants the title. He does not undertake that they are really worth what they represent, but that they are what they purport to be. He warrants the genuineness of the claim upon them. *Flynn vs. Allen*, 57 Pa., 482 *Wright vs. Hobbs*, *Susquehanna Chronicle*, 49. 13. In the absence of warranty, knowledge that the seller knew that his representations were false, is essential to a valid defence against a suit for the price. *Hardy vs. Anderson*, 7 Kulp, 396. 14. When the vendor of personal property makes fraudulent representations, the vendee may stand to the bargain and recover damages, or may rescind the contract and recover the money paid. Where there is an actual disaffirmance by the vendee, the title to the property is revested in the vendor. In cases of fraud, the vendee alone has the right to disaffirm the contract. *Heastings vs. McGee*, 66 Pa., 384. 15. A seller is bound to act with the utmost good faith ; and if he mislead the purchaser by a false or mistaken statement as to any one essential circumstance, the sale is voidable. Whether the party knew the misrepresentation to be false, is wholly immaterial. *Painter vs. Harbaugh*, 25 *Pittsburg Journal*, 53. 16. One who sells land on a description given by himself, is bound to make it good ; if untrue in a material part, though from a mistake, he must respond in damages. *Pfingston vs. Loukle*, 5 Kulp, 189. 17. Where the buyer of an article in market has full opportunity to examine it, and the means of information as to facts affecting its value are equally accessible to buyer and seller, and there is no warranty and no concealment by the seller of facts he was bound to communicate, a mere false assertion of value is not a fraud or mistake in a legal sense. *Rockafellar vs. Baker*, 41 Pa., 319. 18. The rule with reference to fraudulent representations does not apply where the defendant had an opportunity to inspect the article purchased. *Sceah vs. Wright*, 5 Kulp, 246. 19. A manufacturer is not entitled to sell his goods under the false representation that they were made by a rival manufacturer. *Shepp vs. Jones*, 15 Pa.

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County, 59. 20. A purchaser takes the risk of the quality of an article sold, unless there be fraud or warranty. In a sale of goods, there is an implied warranty of title, and generally of the species, but not of quality. Mere misrepresentation is not warranty. The relation of seller and buyer is not a confidential one. *Whitaker vs. Eastwick*, 75 Pa., 229. 21. In a purchase on inspection, and in the absence of fraud, the mere recommendations of the vendor will not amount to a warranty. The jury must be satisfied that the vendor consented to be bound for the truth of his representations. *Welles vs. Oakley*, 1 Kulp, 414.

XXVIII. NEGLECT TO RETAIN GOODS. Where no time is stipulated, within which a conditional purchaser of chattels is to determine whether they suit him, he has the right to take reasonable time to determine whether the goods are satisfactory. In this case, six days were deemed a reasonable time before deciding to take horses that were offered for sale. It was not necessary to return the horses; it sufficed to notify the vendor to take them away, as they did not come up to his representations. *Rohn vs. Dennis*, 109 Pa., 505.

XXIX. NEGLECT TO RETURN GOODS. *Assumpsit* for goods sold and delivered may be maintained, where goods have been delivered by the plaintiff and defendant, although not ordered, if retained by him. The retention implies a promise to pay the market price of the goods. *Deysher vs. Triebel*, 1 Lancaster Bar, No. 49.

XXX. NEGLECT IN SALES BY SAMPLE. 1. A sale by sample, in the absence of fraud or circumstances to indicate that the sample was to be taken as the standard of quality, is not an implied warranty of the quality of the goods sold. The sample, in such case, becomes a guarantee only that the articles to be delivered shall follow its kind, and be simply merchantable. *Boyd vs. Wilson*, 83 Pa., 319. 2. Where goods are sold by sample, coupled with representations that they are of a certain species, there is an implied warranty that the article, when delivered in bulk, will correspond with the

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sample. *Harrison vs. Leach*, 5 Luzerne Register, 71. 3. It is settled law in this state that on a sale by sample there is no implied warranty of quality. *Sidney Furniture Co. vs. School District*, 34 Pittsburg Journal, 169. 4. Where the vendor exhibits samples, and warrants the goods ordered to be like the samples shown, shop-worn goods are unmerchantable. *Tyrell vs. Rockwell*, 2 C. P. Reporter, 223.

XXXI. NEGLECT OF TITLE TO GOODS SOLD. 1. Where there is an actual sale of goods, carried into effect by an actual delivery, the title will pass, even though something remain to be done by the vendor in relation to the goods sold. *Andrews vs. Weaver*, 4 Montgomery Co., 110. 2. Sales of goods tortiously obtained without the owner's consent gives the purchaser no title against the owner, although purchased for a fair consideration and in the usual course of trade, without any suspicious circumstances to awaken inquiry. *Barker vs. Dinsmore*, 72 Pa., 427. 3. A vendee of real estate cannot set up want of title in his vendor as a defence to the enforcement of payment of lien for purchase money. The vendee must rely on his covenant of title, and if there be none there is no redress. *Barnes vs. Transue*, 8 Luzerne Register, 32. 2 Schuylkill Record, 116. 4. A vendee will not be compelled to accept a doubtful title. *Bumberger vs. Clippinger*, 5 W. & S., 311. 5. Every vendor of personal property impliedly warrants the title to his vendee. *Gray vs. Whitney*, 81x Pa., 332. 6. A purchaser cannot be compelled to accept a doubtful title, nor one that is not clearly good. A title is doubtful where its condition invites litigation. A possibility of a contest is not sufficient; it must be considerable and rational, such as would induce a prudent man to pause and hesitate. *Kostenbader vs. Spotts*, 80 Pa., 430. 7. When the vendor of personal property knowingly makes a false representation as to his title to the goods, this can be set up by the vendee as a defence in an action for the purchase money. The purchaser, in such case, must show an eviction or an involuntary loss of possession. *Krumbhaar vs. Birch*, 83 Pa., 426. 8. Goods sold

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fraudulently are liable to be seized in the hands of a second vendee, who buys after a *fi. fa.* against the fraudulent vendor has been delivered to the sheriff. *McCabe vs. Snyder*, 3 Phila., 192. 9. In the absence of fraud, nothing can be recovered for the loss of a parol bargain, but compensation only for the actual loss sustained, such as the payment of money and expenses incurred on the faith of the bargain. This principle applies to the case of a vendor who sells in good faith and is unable to make a good title. In all such cases, the vendee is not permitted to recover for the loss of a good bargain, but is confined to his actual loss. But where the vendor has not acted in good faith, or has been guilty of deception, the vendee is permitted to recover also for the loss of his bargain. *Meason vs. Kaine*, 67 Pa., 132. 10. A purchaser of goods from a bailee for hire takes no title in the goods. *Miller Piano Co. vs. Parker*, 155 Pa., 208. 11. A party selling as his own personal property what is in his possession, warrants the title to the thing sold, and if, by reason of defect of title, nothing passes, the purchaser may recover his money, though there be no fraud or warranty on the part of the vendor. *People's Bank vs. Kurts*, 99 Pa., 344. 12. A purchaser, under articles of agreement, cannot be compelled, in a court of equity, to accept the title if doubtful or unmarketable. A title is doubtful, that exposes the party holding it to litigation. *Speakman vs. Forepaugh*, 44 Pa., 363. 13. A *bona fide* purchaser of a chattel, for a valuable consideration, and without notice from a fraudulent vendee, takes a title clear of the fraud, whether it be actual or legal. *Sinclair vs. Healy*, 40 Pa., 418. 14. If a vendee purchase with knowledge of a defect of title, and take no covenant against it, he cannot set it up as a defence in an action for the purchase money. *Wilson's Appeal*, 109 Pa., 609.

XXXII. NEGLECT TO PROVE TITLE TO GOODS. The generally accepted doctrine is that a *bona fide* purchaser, for valuable consideration, without notice of fraud, from one who has obtained both possession and property, will be protected; but

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mere possession, such as that of a bailee or thief, will not enable a purchaser to acquire title, although he buys in good faith and pays full value. *Levy vs. Cooke*, 143 Pa., 614.

XXXIII. NEGLECT BY OWNER OF EQUITABLE TITLE. Where a sale was made of land by a party having the legal title and holding possession, and the purchaser paid part, and took possession, the holder of an equitable title not recorded and not known at the date of the purchase by the purchaser, can only recover the land by reimbursing such purchaser the amount paid by him. *Youst vs. Mertin*, 3 S. & R., 423.

XXXIV. NEGLECT OF VENDEE. 1. A purchaser with notice of an equitable title in another, acquires no title against the creditors of the real owner. *Asch vs. McIlvaine*, 5 Phila., 45. 2. Where the vendor of land has acted *bona fide* and with reasonable care, and the vendee refuses to carry out the terms of the sale, the measure of damages is the difference of price on the re-sale. But such re-sale must not be wantonly delayed, while the land is notoriously falling in price, or the business is managed negligently. *Ashcom vs. Smith*, 2 P. & W., 219. 3. The purchaser of goods sold and delivered will not be relieved from liability, because another person has made himself responsible therefor, unless the goods were sold under an agreement that the purchaser should not be liable. *Brewer vs. Warner*, 126 Pa., 151. 4. If the vendee, during the negotiation, wilfully misstated a material fact, and thus misled the vendor, and induced him to sell at a lower price, the contract would be void. *Harris vs. Tyson*, 24 Pa., 347. 5. Insolvency of the vendee and his knowledge of it, are not alone such fraud as will enable the vendor to rescind and replevy the goods after they have come fairly and fully into the hands of the vendee. To avoid the sale, there must be artifice, trick or false pretence as a means of obtaining possession, and bad faith and intent at the time to defraud the vendor. *Rodman vs. Thalheimer*, 75 Pa., 232. 6. A vendee, under contract to pay the purchase money of land on delivery of the deed, has no right to the possession before payment or tender

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of the purchase money and a demand for the deed. *Du Bois vs. Baum*, 46 Pa., 537.

XXXV. NEGLIGENCE OF VENDOR. 1. The intention of the parties in the sale and purchase of an article controls. The sale of a coat does not give title to valuables concealed in the pocket. *Huthmacher vs. Harris*, 38 Pa., 491. 2. When the vendor fails to comply with his contract, the general rule for the measure of damage is the difference between the market and contract price of the article at the time of the breach. When the article cannot be obtained in the market, the measure is the actual loss the vendee sustains. *McHose vs. Fulmer*, 73 Pa., 365.

XXXVI. NEGLIGENCE IN WARRANTY OF GOODS. 1. If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose; *aliter*, if the purchaser relies on his own judgment. *Chester Steel Co. vs. Brownscombe*, 11 Lancaster Review, 239. 2. When goods sold with a warranty of quality are retained by the purchaser, the measure of damages for a breach of the warranty is the difference between the market value of the goods contracted for and that of the goods delivered. *Ogden vs. Beatty*, 137 Pa., 197. 3. The false assertion of the soundness of a chattel by a vendor, who at the time knows that his assertion is false, is such a fraud upon the vendee as will entitle him to a rescission, and it is immaterial whether or not the assertion amounted to a warranty. *Nelson vs. Martin*, 105 Pa., 229. 4. A sale of chattels by sample, without fraud, or other circumstances fixing the character of the sample as a standard of quality, does not imply any warranty of quality, but only that the goods shall correspond with the sample in kind. *Selser vs. Roberts*, 105 Pa., 242. 5. In the absence of deceit and express warranty by a vendor, mere representations as to the quality of the thing sold do not constitute a warranty, and are evidence of none. In a sale of personal property on inspec-

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tion, where the vendee's means of knowledge are equal to the vendor's, the vendor does not contract that the thing sold is of the species contemplated by the parties. *Shisler vs. Baxter*, 109 Pa., 443. 6. Where an article is contracted for to be used in a particular manufacture, there is an implied warranty that it shall be suitable for that purpose. *Ulrich vs. Storer*, 24 Pittsburgh Journal, 147. 7. A vendor of goods is not answerable for their quality, unless he has expressly warranted them, or has been guilty of fraudulent representation, or affirmation of a quality known to be false. To create an express warranty, it is not necessary to use the word "warrant," if the words employed are tantamount to it, and not equivocal. No express warranty arises from a mere unfounded naked affirmation of soundness in the sale of a chattel. *Weimer vs. Clement*, 37 Pa., 147. 8. It is a general rule, that in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample. In Pennsylvania this rule is eschewed, and a sale by sample becomes a guarantee only that the article delivered shall follow its kind and be simply merchantable. To constitute a warranty no special form of words is necessary. *West Republic Mining Co. vs. Jones*, 108 Pa., 65.

XXXVII. NEGLECT IN WEIGHT OF GOODS. The statutory ton in Pennsylvania, except in coal in Philadelphia, is 2000 pounds, and upon a sale of goods by the ton, it is not competent to prove that by the custom of a particular trade 2240 pounds constitute a ton. *Harrison vs. Mora*, 26 W. N., 97.

Verdict.

I. NEGLECT IN AMENDING. 1. While the court has the power to amend a verdict so as to make it conform to the intention of a jury, it cannot to meet the supposed equities of the case substitute a verdict of its own. *Grim vs. Reinbold*, 3 Northampton Co., 297. 3 Lackawanna Jurist, 135. 2. Before a verdict is publicly announced and recorded, the jury may change it, even though they had previously sealed it and had separated, there being no evidence that the jury had

Verdict—Continued.

acted improperly. *Thomas vs. Upper Merion*, 7 Montgomery Co., 193. 10 Pa. County, 414.

II. NEGLECT IN AMOUNT. Where the foreman of a jury makes a plain mistake in the amount of a verdict, the court may refer the matter back to the jury to correct the mistake, if the jury has not been discharged. *Philadelphia vs. Pepper*, 17 Phila., 332.

III. NEGLECT OF CHARGE OF COURT. If a verdict is contrary to the charge of the court on a question of law, it must be set aside no matter how often it be rendered. *Howard Express Co. vs. Wile*, 64 Pa., 201.

IV. NEGLECT IN AWARDING EXCESSIVE DAMAGES. 1. A verdict will be set aside, where, according to the clear preponderance of testimony, the damages awarded for injury to land were unreasonable and excessive. *Griffiths vs. Wilkesbarre*, 6 Kulp, 505. 2. It is the imperative duty of the court to protect parties litigant from exorbitant damages, whether they be against a corporation or an individual; and it is the duty of juries to decide cases for damages against corporations precisely the same as they would if it were a suit between individuals. *Musser vs. Ry. Co.*, 15 Pa. County, 430.

V. NEGLECT IN ENTERING. The act of March 22, 1877, does not authorize the entry of a verdict for defendant as a lien against plaintiff in the judgment index. *Deacon vs. Greenfield*, 26 W. N., 264.

VI. NEGLECT IN FORM. 1. A verdict, irregular by a mistake apparent on its face, may be amended after judgment. *Barclay vs. Kerr*, 110 Pa., 130. 2. Where a verdict of a jury is informal or defective, and the intention of the jury is apparent, but the attention of the court is not called to the error at the time, the court can, afterwards, on application, order the amendment, *nunc pro tunc*. *Huckenstein vs. Jolly*, 32 Pittsburgh Journal, 331. 3. Where the court has any elements from which it can fairly expound the verdict, and carry out its substantial finding, the appellate court is not dis-

Verdict—Continued.

posed to scrutinize its exercise of the power of amendment with much nicety. *Keen vs. Hopkins*, 48 Pa., 445.

VII. NEGLECT IN FRAMING. 1. A verdict erroneous in form may be amended by the court. *McCauley vs. McCauley*, 4 W. N., 402. 2. In cases of fraud and for the correction of the misprision of a clerk, the lapse of time appear to be no bar to the reformation of a record. An objection to the verdict should not be delayed. *Smaltz vs. Hancock*, 118 Pa., 550. 3. The power of a judge to put a verdict into form so as to make it express the real finding of the jury is settled, but he is without power so to mould a verdict, in accordance with his views as in effect to make it a new verdict. *Clouser vs. Patterson*, 122 Pa., 372. 4. The general power of the court to amend a verdict so as to make it conform to the verdict actually rendered, is inherent in the court, and where the rights of third parties have not intervened, it is not limited as to time. It rests in the sound discretion of the court, and is not the subject of appeal or writ of error. *Cohn vs. Scheuer*, 115 Pa., 178. *Cope vs. Kidney*, *Idem*, 228.

VIII. NEGLECT TO RECORD. 1. The verdict recorded in court is the only proper verdict. The paper verdict returned by the jury is not evidence, nor is it to be filed or preserved. *Dorrick vs. Reichenbach*, 10 S. & R., 84. 2. A juror has a right to dissent from a verdict before it is recorded, whether the jury is polled or not; and if he does so dissent, there is no valid judgment. *Scott vs. Scott*, 110 Pa., 387.

IX. NEGLECT IN RENDERING. 1. The courts have the right to set aside a verdict in a criminal case, where the judge thinks it was against the weight of evidence. *Comm. vs. Platt*, 24 Pittsburg Journal, 82. 2. Where the verdict of a jury is not altogether against the evidence, but is warranted by any portion of the testimony, the court, though believing the verdict is against the weight of the evidence, is not at liberty to set it aside for the purpose of granting a new trial. *Dcysher vs. Hilsinger*, 2 Woodward's Decisions, 153. *Brown vs. R. R.*, *Idem*, 144. *Becker vs. Maurer*, *Idem*, 264. *Keim vs. Manker*,

Verdict—Continued.

Idem, 412. 3. When juries are so palpably regardless of their duty, and of the sanctity of their oaths, that they permit their verdicts to be rendered in obedience to their prejudices or their sympathies, the trial court should deal with them in a firm and decisive manner, and should reject their erroneous verdicts without hesitation and delay. *Holden vs. R. R.*, 169 Pa., 1. 4. A verdict, after being recorded, may be amended by the court, so as to make it conform to that actually rendered by the jury. *Ivens' Appeal*, 33 Pa., 237. 5. In a criminal case, the jury are the judges both of the law and fact, and are not bound by the opinion of the court upon the law. The verdict may be contrary to the instructions of the court upon the law. *Kane vs. Comm.*, 89 Pa., 522. 6. Where a verdict is inconsistent and against the binding instructions of the court, it will be set aside. Also, where its performance is impossible. *Le Van vs. R. R.*, 5 W. N., 293. *Bruck vs. Maulsberry*, 14 Lancaster Bar, 194. 7. A verdict rendered against the charge of the court in point of law, must be set aside, whether the charge was right or wrong. *Loan Co. vs. Conover*, 5 Phila., 153. 8. The fact that a defendant charged with crime happens to be absent from the court room when the jury return a verdict of guilty, is no ground for a motion in arrest of judgment. *Lynch vs. Comm.*, 88 Pa., 189. 9. Where a verdict is rendered against the binding instructions of the court, a new trial should be granted, even though it may be possible that the court erred in such instructions. *McDade vs. Campbell*, 2 Kulp, 325. 10. A verdict taken against two or more defendants, when the evidence will justify a verdict against one only, may be corrected on a motion for a new trial by judgment being entered against one only. *Peart vs. Prosser*, 6 Lancaster Bar, No. 48. 11. The reception of a verdict after the actual adjournment of the court is erroneous. Giving the order to adjourn, and rising preparatory to separation, is not actual adjournment, if the judges are still on the bench, and parties remain. *Person vs. Neigh*, 52 Pa., 199. 12. Where a judge instructs a jury

Verdict—Continued.

that, upon the whole evidence, their verdict ought to be for the defendant, he should not permit a verdict to be given for the plaintiff, nor allow the jury to retire until it had given a verdict according to his instructions. *Wade vs. Fahrig*, 4 **Penny-packer**, 252. 13. If a jury include in their verdict more than the issue, the residue will be rejected as surplusage and will not vitiate. *Wall vs. Ass'n*, 2 **Lancaster Bar**, No. 41.

X. NEGLECT TO REVERSE. After the trial and decision of a case on its merits, a court of errors ought not to reverse for merely formal mistakes, where substantial justice has been done according to law. *Lycoming Ins. Co. vs. Sailer*, 67 **Pa.**, 118.

XI. NEGLECT TO SET ASIDE. 1. It is too late to move to set aside a verdict as defective after the court has recorded it and discharged the jury. *Lehman vs. Hildebrand*, 10 **Lancaster Review**, 249. 2. Where a jury finds a verdict contrary to the evidence and to the instructions of the judge, the remedy is by the court below granting a new trial, and not by a writ of error. The verdict in such case should be set aside. The omission to do this is not the subject of error. *Hanover R. R. vs. Coyle*, 55 **Pa.**, 396.

XII. NEGLECT IN SPECIAL VERDICT. 1. A special verdict must contain all facts essential to decision, which cannot be supplied by reference to the charge of the court below. *Craven vs. Gearhart*, 1 **W. N.**, 257. 2. A special verdict must state facts essential to the entry of a judgment on it. It cannot be aided by intendment or a reference to extrinsic facts appearing upon the record. *Kincaid vs. Schultz*, 21 **Pittsburg Journal**, 172. *Twigg vs. Treacy*, *Idem*, 226. 3. What is not found by a special verdict will be taken not to exist. If the special verdict be defective or uncertain, no judgment can be entered on it; it must be set aside and a *venire de novo* awarded. *Lowe vs. Stocker*, 61 **Pa.**, 347. 4. It is essential to a special verdict that it contains all the facts upon which the judgment of the court is to rest. Nothing is to be taken by implication or intendment. *McCormick vs. Ins. Co.*, 163 **Pa.**,

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184. *Pittsburg R. R. vs. Evans*, 53 Pa., 250. *Vansyckel vs. Stewart*, 77 Pa., 124.

XIII. NEGLECT TO FIND A SPECIFIC SUM. A verdict in an action of debt finding no specific sum is void, and a judgment thereon will be reversed on that ground alone. *Miller vs. Hower*, 2 R., 53. *Whitesides vs. Russell*, 8 W. & S., 47. *Schmertz vs. Shreeve*, 62 Pa., 457.

XIV. NEGLECT IN TRANSFERRING. A verdict rendered in one county cannot be transferred to another county for the purpose of a lien, as in the case of a judgment. The exemplification of the record in such case filed in the second county was properly stricken off. *Bailey vs. Eder*, 90 Pa., 446.

XV. NEGLECT BY UNCERTAINTY. A verdict is not good, unless it carries certainty upon its face, or refers to things by which it may be made certain. *Smith vs. Jenks*, 10 S. & R., 154.

Vessels. See "BOATS," "STEAMBOATS," "SHIPS."

I. NEGLECT IN ANCHORING. 1. It is negligence for a vessel to anchor at night in mid-channel. *Ajace vs. Tug Shaw*, 14 Phila., 579. 2. The officers of a vessel are negligent in anchoring near the middle of a narrow channel, but this will not excuse the negligence of a tug-boat in not keeping off from such vessel, where there was room to do so. In this case, a collision resulted and cross-suits were brought by the owners of the respective vessels against each other. The court allowed half damages and half costs to the libellant in each case. *Sloop Nanticoke vs. Bark Milligan*, 15 Phila., 430.

II. NEGLECT TO UNLOAD CARGO. When the master of a vessel, by reason of his tardiness in discharging the cargo, prolongs the time so much that the consignee is unable to get his lighters alongside by reason of the freezing of the river, he will not be entitled to demurrage. *Cacace vs. Smith*, 16 Phila., 549.

Vessels—Continued.

III. NEGLECT IN UNLOADING. The extent of duty of the owners of a vessel is to use due diligence in unloading her. If delay is necessarily occasioned by the previous occupancy of the wharf by other vessels, no damages for the delay can be recovered. *Osage vs. Ridgway*, 18 Phila., 560. *Sheppard vs. Ice Co.*, 3 W. N., 565.

IV. NEGLECT IN MONOPOLIZING CHANNEL. Where the channel of a stream becomes tortuous or difficult, and other vessels are approaching, a vessel should take that position in the river which may best allow them to pass her. *Flannery vs. The Ontario*, 4 Clark, 312.

V. NEGLECT IN OBSTRUCTING CHANNEL. Where a sunken barge obstructs a channel, it is the duty of the owner to remove it speedily. After a time, it may be treated as a nuisance. *McBride vs. The Atlee*, 15 Phila., 438.

VI. NEGLECT, RESULTING IN COLLISION. 1. Where a vessel is properly moored at a wharf and is run into and injured by a passing vessel, a presumption of negligence on the part of the moving vessel exists, and unless such presumption is repelled, the respondent must answer in damages. *Bacon vs. The Brady*, 18 Phila., 558. 2. In a case of maritime collision, where both vessels were in fault, a decree of half damages was entered. In a collision in a river, where the libellant had the right of way, the respondent is liable unless he proves that the libellant disregarded the ordinary rules of navigation. Where the testimony as to the fact of collision is in direct conflict, the doubt may be fairly resolved in favor of either vessel. *Pierrepoint vs. The Mary Morgan*, 15 Phila., 436. *William Marshall vs. The Bessie Morris*, *Idem*, 458. *Warren vs. The Maryland*, *Idem*, 466. 3. A schooner having the right of way, had the right to presume that an approaching bark would respect her right and display unusual care. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way. *Weeks vs. The Ephrussi*, 18 Phila., 563. *Helena vs. The Lord O'Neil*, *Idem*, 564.

Vessels—Continued.

VII. NEGLECT TO CONSTRUCT. In an action of covenant for failure to perform an agreement to construct and deliver a vessel in a specified time, the measure of damages is the difference between the profits the plaintiff might have earned with the vessel, if completed, and the profits he might have earned by hiring other vessels. *Wood vs. Derbyshire*, 2 Delaware Co., 247.

VIII. NEGLECT IN ALTERING COURSE. 1. It is the duty of a sailing vessel when approaching a steamer, to keep her course. *Belgenland, In re*, 14 Phila., 567, 495. 2. A sailing vessel ahead has no right to change her course without reference to the position of an overtaking steamer or other vessel, so as to permit the risk of a collision. She should not attempt to cross the bows of the steamship under such circumstances. *Schooner Ellen Holgate vs. Steamer Illinois*, 13 Phila., 470.

IX. NEGLECT TO CHANGE COURSE. When a vessel attempts to cross the bow of another which has the right of way, the latter should do all in her power to avoid a threatened collision. She is not bound, however, to change her course, unless there is evident danger of such an event, nor will she be held liable for an honest miscalculation of the speed of the two vessels and their distance apart. *Gettysburg vs. The Davis*, 16 Phila., 566.

X. NEGLECT IN CROWDING INTO DOCK. It is negligence for a vessel to crowd into a dock to the injury of vessels which may be moored there. Damages may be awarded in such case. *McMahon vs. The Hall*, 15 Phila., 457.

XI. NEGLECT IN DETAINING. The Board of Health has not an unlimited arbitrary right to detain a vessel after there is no longer an appearance of malignant disease upon it. *Sumner vs. Philadelphia*, 1 Foster, 299.

XII. NEGLECT IN MANAGING DRAWBRIDGE. The admiralty court has jurisdiction in case of damage by a drawbridge to a vessel sailing on navigable waters. *Etheridge vs. Philadelphia*, 17 W. N., 224.

XIII. NEGLECT TO INSURE. Where the widow and heirs

Vessels—Continued.

of a decedent requested the executor not to insure a vessel held by the estate, the executor will not be held liable for neglect to insure. *Seaton's Appeal*, 24 *Pittsburg Journal*, 120.

XIV. NEGLIGENCE IN FILING LIBEL FOR DAMAGES. A libel for damages done to the cargo may be filed even after the vessel has made one or two voyages subsequent to the injury being received. Admiralty has jurisdiction to enforce such a claim against the vessel. *Knox vs. The Ninetta*, 3 Clark, 173.

XV. NEGLIGENCE TO DISPLAY LIGHTS. 1. Under the federal statutes, a sailing vessel must exhibit a lighted torch at night upon the approach of a steam vessel. *Algiers, In re*, 18 W. N., 143. 2. It is the duty of all vessels to carry the signal lights required by law, and when two are blamable for a violation of duty and a collision occurs, they must share the loss. *Elliott vs. Volunteer*, 7 Phila., 568. 3. The enactment by congress, that every sailing vessel shall on the approach of any steam vessel during the night-time show a lighted torch, does not apply in every case in which such boats pass near to each other. Where the cause of the collision of a steamer with a schooner was a mistaken movement of the steamer, after the schooner's green light had been sighted, the steamer was condemned as responsible, though no torchlight had been shown by the schooner. *Tonawanda, In re*, 11 Phila., 516. 4. Where a collision occurred in mid-ocean between a steamer which was running at full speed when the night was dark and foggy, and a schooner which failed to display a torch, held, that the schooner was guilty of contributory negligence. Held, that half damages only should be allowed, and that the costs should be apportioned. *McLaren vs. The Pennsylvania*, 18 Phila., 525. 5. The failure of a schooner to display a torch, as required by statute, must be taken as a contributory cause in case of an accident, unless it is clearly shown that its not being lit could have had no effect. Excessive speed in a steamer may also lead to a collision. *John H. McLaren vs. Steamer Pennsylvania*, 15 Phila., 452. *Samuel Cain vs. Steamship Roman*, 15 Phila., 503. 6. Under marine law and custom, certain lights or torches are

Vessels—Continued.

to be used at night by vessels on approaching each other. If a vessel fails to display the proper light, and a collision results, the owner of such vessel is liable in damages. *Margaret, In re*, 6 W. N., 304. 7. It would seem that though a sailing vessel is not bound to carry lights at sea, yet if a collision occurs occasioned by their absence, the party thus in fault will be held liable. *Osprey vs. The Delaware*, 5 Clark, 172. 8. The failure to display the exact statutory light by a vessel at anchor, is not sufficient contributory negligence to prevent recovery of damages for a collision occasioned by the reckless navigation of the other vessel. *Scottish Bride vs. Kelly*, 8 Phila., 151. 9. Where a vessel is lying near to but is not moored to a wharf, or with vessels at a wharf, without a signal light hoisted on dark nights, she must take the consequences of collision with another vessel moving prudently to her accustomed berth. *Stiles vs. The John Stevens*, 4 Clark, 281.

XVI. NEGLECT TO KEEP A PROPER LOOKOUT. 1. It is the duty of a vessel to keep a proper lookout at the bow, if a man can safely stand there. When the night is dark, it is especially important to maintain a vigilant watch. It is negligence for a steamer to run at such a rate of speed, that the dashing of the waves over the bow makes it impossible for a man stationed there to see ahead. *Luna vs. Belgenland*, 14 Phila., 495, 567. 2. A failure to keep a proper lookout, whereby the libellant failed to discover the respondent until a collision was imminent, is such contributory negligence as will justify an award of only half damages. When a collision has occurred, it is the duty of each vessel to endeavor to ascertain the extent of the injury to the other, and the necessity for help. It was gross negligence to entrust the lookout of a steamer in a fog to an inexperienced boy. *Schooner Huddell vs. Bark Hayward*, 15 Phila., 440. *Lippincott vs. Pottsville, Idem*, 444.

XVII. NEGLECT IN MOORING. 1. The vessel mooring must make use of the ordinary care which the safety of others ordinarily demands, under the circumstances. The right of moorage is protected by requiring vessels in motion to steer

Vessels—Continued.

clear of those moored, so as not to strike them nor injure them by their swell. *Brown vs. Stone*, 5 Clark, 75. 2. While the right of mooring vessels at public wharves should be protected, it is to be exercised with due regard to the necessities of passing vessels. A vessel is not chargeable with contributory negligence in a collision, where her improper position was the result of a previous collision in which she was not to blame. *O'Neil vs. The St. Lawrence*, 31 Pittsburg Journal, 286. 3. It is negligence to take a barge into a dock between two large steamships lying close together, their bows almost touching, when it is known that one of them is liable to "list" or careen towards the other. *Ward vs. The Behera*, 14 Phila., 582.

XVIII. NEGLIGENCE IN NAVIGATING. The incautious navigation of a moving vessel in a place that requires cautious movement, is negligence, and often results in collision. *Scottish Bride vs. Anthony Kelley*, Leg. Gaz. Report, 289.

XIX. NEGLIGENCE TO PROTECT PASSENGERS. No punishment higher than a reprimand can ever be inflicted upon a passenger without a conference between the officers of a ship and an entry of the facts in the log-book. *Krauskopp vs. Ames*, 4 Clark, 100.

XX. NEGLIGENCE IN PASSING EACH OTHER. A sailing vessel ahead has no right to change her course or alter her tack, without reference to the position of a steamer or other overtaking vessel, so as to permit the risk of a collision. *Ellen Holgate vs. The Illinois*, 25 Pittsburg Journal, 157.

XXI. NEGLIGENCE IN PASSING MOORED VESSELS. It is incumbent upon a vessel approaching another moored at its usual landing place to steer clear of it and avoid a collision. *Ross vs. Grubbs*, 30 W. N., 198.

XXII. NEGLIGENCE TO MAKE SEAWORTHY. 1. The defendant in an action on a general average bond may show as a defence thereto that the loss was caused by the unseaworthiness of the vessel. *Cheraw R. R. vs. Broadway*, 109 Pa., 432. 2. In the contract of carriage by water, there is no warranty of sea-

Vessels—Continued.

worthiness, as in a policy of insurance. To entitle the carrier to recover his freight, he need not prove that the master and crew were competent and sufficient. He is responsible only if their unfitness contributed to produce the injury. *Hays vs. Millar*, 18 *Pittsburg Journal*, 294.

XXIII. NEGLECT TO OBSERVE SIGNALS. Where two vessels proceeded up the river, one of them slightly in advance of the other, the one in advance signalled that she was about to cross the stream. She attempted to do so, but, fearing danger, stopped, and a collision resulted. Held, that the fault lay entirely with this vessel. *Gratitude vs. The Eutaw*, 15 *Phila.*, 463.

XXIV. NEGLECT IN STEERING. 1. A vessel in motion must steer clear of one moored, or at anchor; and in case of injury to the latter from the former, no excuse will avail but unavoidable accident, or that *vis major* which no human skill or precaution can guard against or prevent. *Baker vs. Lewis*, 33 *Pa.*, 301. 2. A vessel may hold her course in a navigable stream without regard to a fisherman's net, if the master act without wantonness or malice and do no unnecessary damage. Fishery is an acknowledged right, but is subordinate to the rights of navigation. *Cobb vs. Bennett*, 75 *Pa.*, 326. 3. If two sailing vessels have the wind free, or abeam, they must both keep to the right. *Reeves vs. R. R.*, 30 *Pa.*, 462.

XXV. NEGLECT TO YIELD THE RIGHT OF WAY. Under the maritime rules for preventing collisions, it is the duty of a vessel having the wind on her port side and being the overtaking vessel, to give way and keep out of the way of another vessel. *French vs. Victoria*, 10 *Phila.*, 292.

See "BOATS," "CANAL BOATS," "STEAMBOATS."

Viewers.

I. NEGLECT TO ACT. Where the court appoints viewers to assess damages to property-holders by the opening of a street, and they neglect to act, the court will recommit the report to the viewers on motion. *Poplar Street, In re*, 1 *Lancaster Review*, 29.

Vessels—Continued.

II. NEGLECT TO MEET PURSUANT TO NOTICE. It is imperative, that a jury of viewers upon a proposed road should meet at the time and place designated in the notice to land owners, before commencing its view. *Lower Merion, In re*, 5 C. P. Reporter, 249.

III. NEGLECT OF NOTICE OF MEETING. 1. A posted notice of the time and place of meeting of viewers to assess damages, is sufficient notice to a non-resident. *Carpenter Street, In re*, 3 Walker, 286. 2. The omission by road viewers to state the date of their meeting to view, is not sufficient of itself to set aside their report, if it appears that the parties interested had due notice of the actual view. *Limerick Road Case*, 1 Montgomery Co., 171. 3. Where viewers are appointed to lay out a road, they must give notice of the time and place of meeting, otherwise the court is without jurisdiction. *Shawhan's Petition*, 4 Lancaster Review, 255. 4. Unless the report of viewers shows affirmatively, that notice of the place of meeting of the reviewers was given to the most active of the petitioners, the report will be set aside. *Saucon Township Road*, Lehigh Valley Rep., 104. 5. In proceedings to open a public street in a borough, under the act of April 22, 1856, the persons whose properties are to be affected by the opening are entitled to notice of the time and place of meeting of the viewers. *Wilbur Street, In re*, 6 Montgomery Co., 133.

IV. NEGLECT IN REPORT. Where viewers are appointed to assess damages for the construction of a railroad and the works connected therewith, it is a fatal omission not to state in their report, that they made a just allowance for the advantage likely to result to the landowner, and compared the advantages and disadvantages. Where the damages are grossly excessive, the court below may set aside the report of the viewers. *Phila. & Erie R. R. vs. Calk*, 95 Pa., 139.

W

Wages.

I. NEGLECT IN APPROPRIATING. A laborer claiming \$200 out of the proceeds of an execution under the act of April 9, 1872, may appropriate payments for wages made to him within six months preceding the sale to wages due him prior to the six months. *Wagner's Appeal*, 14 W. N., 104.

II. NEGLECT IN ASSIGNING. 1. An assignment of wages to be earned in the future, executed when the assignor was not in the employment of the party from whom payment of the wages is demanded, is void, as against public policy, and will not be enforced by the courts. *Woodring vs. R. R.*, 2 Pa. County, 465. *Lehigh Valley R. R. vs. Woodring*, 116 Pa., 513. 19 W. N., 372. *Jermyn vs. Moffitt*, 6 Lancaster Bar, 22. 2. Labor' claims for wages under the act of April 9, 1872, and its supplement of June 12, 1878, may be sold and assigned, and the assignee invested with all the rights of the original claimant. *Riddlesburg Coal Co.'s Appeal*, 114 Pa., 58. 3. An assignment by a laborer of his claim need not be in writing to make it binding. A contract by words is equally binding. A person not engaged in any employment for another, and not under contract therefor, cannot make a valid assignment of all wages which he may earn in the future without limit as to time or amount. Such an assignment is against public policy and void. *Schlosser vs. Iron Co.*, Lehigh Valley Rep., 6. *Woodring vs. R. R.*, *Idem*, 357.

III. NEGLECT IN ATTACHING. There is no jurisdiction in the courts to permit the attachment of wages, even in the case of non-residents. *Matson vs. Bryan*, 26 W. N., 248.

IV. NEGLECT IN CLAIM. 1. A claim for wages is not entitled to a preference under the act of April 9, 1872, when the evidence does not show that the labor was in and about

Wages—Continued.

the business in which the assignors were engaged, or in and about the property from the sale of which the fund arose.

Child's Estate, 135 Pa., 214. 2. A claim for wages for labor should specify the kind of labor. It will suffice, if it describes the time within which the labor was performed as within six months immediately preceding the proposed sale. *Garretson vs. Harris*, 2 Pa. Dist., 719.

V. NEGLECT IN MODE OF PAYMENT. 1. An employee may waive his right, under the act of May 20, 1891, to receive his wages in cash, and may validly consent to receive his pay in store orders. *Hamilton vs. Jutte*, 16 Pa. County, 193. 2. The reasonable construction of the act of June 29, 1881, is that the employee may decline to receive anything but cash or an order redeemable in cash, in payment of his wages, but if he does receive goods in payment, he waives his right to demand cash. *Row vs. Haddock*, 14 Luzerne Register, 508.

VI. NEGLECT IN NOTICE OF CLAIM. 1. Four ingredients must appear in the notice served on the sheriff by a wage claimant seeking a preference: (1) That the labor was performed within the time limited by statute. (2) That it was performed in a business defined by the act. (3) That the property subject to the preferred lien is embraced in the sheriff's levy. (4) The amount due the claimant. "Work done" is not a sufficient description of the character of the labor. The lien is limited to the specific property where the work was done. The claim must state the process of execution. The claim is not affected by the residence of the claimant. *Allison vs. Johnson*, 92 Pa., 314. *Pardee's Appeal*, 100 Pa., 408. *Wackes vs. Hoffaches*, 2 York Record, 105. *Crater vs. Deemer*, 1 Northampton Co., 112. *Kauffman vs. Mosser*, 3 Pa. Dist., 90. *Coates vs. Wright*, *Idem*, 392. *McCleaster's Assignment*, *Idem*, 607. *Wolf vs. Tillinghast*, *Idem*, 388. 3. Lackawanna Jurist, 209. 2. A notice of claim for preference, which does not set out the kind of business in which the defendant is engaged, is defective. *Leinaw vs. Albright*, 28 W. N., 165. 3. Certainty to a reasonable intent is all that is required in

Wages—Continued.

notices to the sheriff of claims for wages under the act of June 13, 1883. It is the better practice to make the claim under oath. *Shives vs. Clouser*, 4 Pa. County, 149. *Brown vs. McFadden*, 5 *Idem*, 9. 4 Montgomery Co., 75. 4. The notice of a preferred claim for wages to be paid out of the proceeds of the sale, should be full and precise. The claim for work done after the levy is not a preferred claim. *Brandon vs. Davis*, 2 Schuylkill Record, 142. *Kindig vs. Atkinson*, *Idem*, 244. 5. To entitle a wage claimant to preference in the distribution of the proceeds of an execution, the written notice to the sheriff should show: (1) The process by which the goods are under execution. (2) The amount claimed to be due as a preference, which must not exceed \$200. (3) That such amount is claimed as a lien on the property under execution. (4) The character of the labor rendered within the meaning of the statutes. (5) That such labor or service was performed in a business carried on by the execution debtor, which business must be within the scope of the statutes. (6) The time when the services were rendered, which must not exceed six months immediately preceding the sale. *Sanger vs. Skinner*, 16 W. N., 16. *Brown vs. Brown*, Lehigh Valley Rep., 167. *Leinau vs. Albright*, 10 Pa. County, 171. *Schwartz vs. Danenhower*, 2 Montgomery Co., 19. 6. The wages claimant must set forth in his notice all those facts which are essential to the creation of a valid lien upon the property under levy, and if the notice is essentially defective, it cannot be helped out after sale. *Neugass vs. Herskowitz*, 4 Kulp, 431. 7. A notice in writing to the sheriff of a claim for preference for wages under the act of April 9, 1872, must refer to the process in the sheriff's hands, the property levied on, the amount and date of the claim, and for what. *Shields vs. Scott*, 1 Chester Co., 123. *Bennett's Estate*, 1 *Idem*, 269. 8. A laborer, who claims a preference for wages under the act of April 9, 1872, must comply strictly with the provisions of the act in regard to the notice, otherwise he will have no priority. *Roberts' Appeal*, 110 Pa., 325. 9. A notice in writing, at any

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time before the actual sale of the property, stating the amount claimed, for what, and out of what estate, is sufficient notice of a claim for wages under the act of April 9, 1872. *Bennett's Estate*, 2 York Record, 126. 25 Pittsburg Journal, 143. 10. Under the act of April 9, 1872, the notice of the claim for wages must be in writing, and delivered to the officer executing the writ before a sale takes place. The notice must state the business in which the employer was engaged, the kind of service rendered by the claimant, whether as a clerk, mechanic, miner or laborer, and the fact that a lien is claimed upon the property seized by the officer, also the particulars of the service and the amount claimed. *Peiffer's Estate*, 6 Luzerne Register, 101. *Bennett's Estate*, 7 *Idem*, 2. 11. A notice, under the act of April 9, 1872, by a laborer, miner, mechanic or clerk, of his lien not exceeding \$200 for labor for services rendered within six months, is too late if given to a constable, after the sale of the goods, even if the proceeds thereof are still in his hands. *Allison vs. Johnson*, 92 Pa., 314. 12. A claim for wages under the act of 1872, must be made to the sheriff strictly in accordance with that act. An attorney at law or authorized agent of the claimant for wages can sign and give the proper notice of claim. Claimants of a firm are not entitled to a preference in the individual estate of a partner. *Ulrich vs. Feaser*, 2 Lancaster Review, 25. *Hartman's Appeal*, *Idem*, 72. 13. Any person who claims the benefit of the wages act of April 9, 1872, must bring himself clearly within the description of persons who are entitled to its peculiar and special advantages. *Ely vs. Stanton*, 120 Pa., 536

VII. NEGLECT TO ALLOW. 1. The act of April 9, 1872 (wages of mechanics, etc.), does not apply to the wages of persons employed about a hotel. *Allen's Appeal*, 81x Pa., 302. *Sullivan's Appeal*, 77 Pa., 198. 2. The act of April 9, 1872, giving certain employees priority of claim for wages, does not apply to a farm laborer. Wages of labor earned after a levy on personal property are not entitled in the distribution to have priority over the claims of the execution cred-

Wages—Continued.

itor. The act gives preference to a claim for wages for work performed within six months before a judicial sale, not exceeding \$200. There must be written notice of the claim furnished the sheriff before the sale. *Solms' Estate*, 13 Phila., 359. *Schwartz vs. Banks, Idem*, 540. *Kindig vs. Atkinson, Idem*, 542. *Boyer vs. Renninger*, 2 Northampton Co., 335. *Balcom vs. Moon*, 17 W. N., 219. 3. A laborer by the week, at a fixed rate, but for an unspecified time, is bound by an engagement that if he quit the employment without giving the notice agreed upon, he shall forfeit the pay due him when so quitting. *Pottsville Iron Co. vs. Good*, 116 Pa., 385. 4. The skilled employee of a florist has no preferred claim. He is not a laborer, in the view of the act. *Pfaender vs. Hoffman*, 4 W. N., 171. 3. A claim for wages is not preferred to a judgment entered before the work was done. *Schnapp's Appeal*, 1 W. N., 149.

VIII. NEGLECT TO CLAIM. 1. The relinquishment by a father to his minor son of his right to the son's earnings, may be implied from circumstances. *Beaver vs. Bare*, 104 Pa., 58. 2. Mechanics, miners and laborers claiming their wages under the act of April 9, 1872, must give notice in writing to the officer executing the process before the actual sale of the property, otherwise, there is no lien. No lien exists for wages earned after the property was levied on. *Corry Bank vs. Childs*, 10 Phila., 482. 2 Foster, 186. *Schrader vs. Burr, Idem*, 263. *Livingood's Appeal*, 17 W. N., 420. 3. It is entirely incredible that a domestic servant, having no other means of support but her wages, would remain in service for three years and receive but a trifling proportion. *Coulston's Estate*, 161 Pa., 154. 4. Where a domestic servant has made no demand for payment of wages for a long period after the termination of such service, the inference is either that the wages have been paid, or the services were gratuitous; but such presumption does not arise, where the servant has continued in the service of the decedent until his death, and made the demand after such death. *Clayton's Estate*, 4 Montgomery Co., 177. *Cooper's*

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Estate, 19 Phila., 203. *Dunwoody's Estate*, 16 Phila., 2. *McConnell's Appeal*, 97 Pa., 31. *Houck vs. Houck*, 99 Pa., 5. Where a stale claim for alleged wages due for domestic service is presented against a decedent's estate, suspicion is aroused at once, and the claim must be sustained by clear and satisfactory evidence to be allowed. *Coulston's Estate*, 10 Montgomery Co., 20. 6. An agreement by a laborer to waive the proviso exempting wages from attachment, embodied in a promissory note, is void. *Firmstone vs. Mack*, 49 Pa., 387. 7. Claims for services and wages accruing for years, but not presented until after the death of the alleged debtor, should have every fair intendment made against them. *Larkin's Estate*, 16 W. N., 541. 8. A claim for wages under the act of April 9, 1872, is not limited to wages earned before the levy, but includes wages earned up to the day of sale. The benefits of the supplement of June 13, 1883, extends the rights of employees to priority in their claims for wages to other kinds of business than those provided for in the original act. *Matsinger vs. Publishing Co.*, 14 W. N., 70. *Thompson vs. Wingert*, *Idem*, 483. *Contra*, *Jacobs vs. Woods*, *Idem*, 237. *McMillen vs. Corry Bank*, 1 W. N., 55.

IX. NEGLECT TO COMPUTE. If one hired at an agreed price, for a certain time, continue in the same employment after the expiration of the term, without any new agreement, the presumption is, that the parties understood that the original rate of compensation was to be continued. *Rauck vs. Albright*, 36 Pa., 367.

X. NEGLECT TO EARN. 1. In an action brought by an employee for wages, the employer, under a plea of *non-assumpsit*, may prove a loss suffered by reason of the negligent and unskillful manner in which the work was performed, as a *pro tanto* defence to the plaintiff's claim. *Glennon vs. Manufacturing Co.*, 140 Pa., 59. *Rafferty vs. Clark*, 2 Pa. County, 301. 2. A servant cannot recover wages while incapacitated for work owing to injuries resulting from the incidental risks of his employment. *Shaw vs. Deal*, 7 Lancaster Review, 38.

Wages—Continued.

XI. NEGLECT TO PAY. 1. Wage claimants are entitled to a dividend upon the whole amount of their claims, without regard to their preference for wages. *Evan's Estate*, 1 York Record, 176. 2. Where one who is not a relation and not an object of charity, but able to earn wages, is employed in the service of another for any period of time, the law implies a contract of hiring and a promise to pay. *Moreland Township vs. Davidson*, 71 Pa., 371. 3. Where the plaintiff, employed by the defendants to do their hauling for one year at a stipulated sum to be paid monthly, was discharged before the year expired, the measure of his damages was not the unpaid balance of the year's wages, but the reasonable profit he would have made if permitted to perform. *Nixon vs. Myers*, 141 Pa., 477. 4. A servant who sues his employer for wages, is not guilty of such a violation of the fidelity due from a servant to his master as will warrant the master in discharging him. *Root vs. Telephone Co.*, 17 Phila., 47.

XII. NEGLECT TO PERFORM LABOR. One who performs a contract to deliver lumber, by hiring teams and drivers, but who does no hauling himself, is not a "laborer" within the meaning of the act of April 9, 1872, and is not entitled to the preference provided by that act. *Wentroth's Appeal*, 82 Pa., 469.

XIII. NEGLECT TO PREFER. 1. Claims for wages earned after levy and before sale are not entitled to preference, where the sheriff takes actual possession of the property. *Central Newspaper Union vs. Gracie*, 7 Pa. County, 183. *Dixon vs. Glass Co., Idem*, 235. 2. Under a sale by an assignee for creditors, the claims of workmen for wages have a preference in the fund arising therefrom over a claim for rent or taxes. Rent is only a preferred claim, when the fund arises from a sale under an execution. *Ellenwold Coal Co., In re*, 7 Luzerne Registee, 19. 3. No preference is given to wages for the labor of minor children, claimed by their father. *Henry vs. Sheaffer*, 3 Pa. Dist., 347. 4. The wages of laborers for services rendered between the date of the levy of an execution

Wages—Continued.

and the day of sale, are entitled to a preference in distribution. *Noble vs. Ore Bank Co.*, 1 Delaware Co., 335. 14 Lancaster Bar, 110. 5. The act of June 13, 1883 amended the act of April 9, 1872, by introducing a new and increased class of beneficiaries, whose claims for wages shall be preferred and first paid out of the proceeds of the sale of the property of insolvent debtors, owing wages to such parties. Under the act of 1883, a farm laborer is entitled to preference for wages. *Periepi vs. Frankenfield*, 1 Montgomery Co., 21. *Alderfer vs. Beyer*, 2 *Idem*, 161. 6. A civil engineer is not a laborer within the meaning of the act giving a lien or preference for wages. *Penna. & Del. R. R. Co. vs. Duffer*, 84 Pa., 168. 7. Farming is not such a business as is contemplated by the acts of April 9, 1872, and June 13, 1883, relating to wages, and the wages of farm laborers are not entitled to a preference under said acts. *Schwartz vs. Rhoades*, 6 Pa. County, 385. 8. Farm hands, menial servants, clerks in commercial establishments, skilled employees and contractors, under the act of 1872, are not entitled to preference in their claims for wages. The act of 1883 gives farm hands a preference. *Sable's Estate*, 1 Chester Co., 52. *Sackett's Estate*, *Idem*, 136. *Prindle vs. Lichtenberger*, *Idem*, 485. *John's Estate*, 2 *Idem*, 458. 9. There is no protection for wages under the act of 1872, after the levy is made. *Teets vs. Teets*, 6 Luzerne Register, 19. *Graham vs. Machine Co.*, 7 *Idem*, 27. 10. Farm laborers are entitled to a preference for wages, but the employment must be continuous, not temporary, in its character. *Wilson vs. Gibson*, 10 Pa. County, 191.

XIV. NEGLECT TO RECEIVE. In an ordinary contract of hiring, a present by the master to the servant is not to be deducted from his wages. The performance of labor by one for another raises an implied *assumpsit* to compensate it, but the implication may be rebutted by proof of circumstances showing such relation as repels the idea of a contract. *Neal vs. Gilmore*, 79 Pa., 421.

Wagoner.

NEGLECT IN CARE OF GOODS. A wagoner who carries goods for hire is a common carrier, even if such transportation be but an occasional and incidental employment. *Gordon vs. Hutchinson*, 1 W. & S., 285.

Wagons.

I. NEGLECT OF DRIVER. If, through unskillful driving on the part of a servant in the presence of his master, who made no opposition, a collision occurred with another wagon, the master is responsible in damages. *Strohl vs. Levan*, 39 Pa., 177.

II. NEGLECT IN TURNING OUT OF ROAD. The principle that a footman or horseman cannot compel a teamster who has a heavy load to turn out of the beaten track of the road if there be sufficient room for the former to pass, is applicable to the case of a light wagon or carriage with heavy draught. *Beach vs. Parmeter*, 23 Pa., 196.

III. NEGLECT TO RENDER SECURE. Even where the servant of a defendant granted an express permission to the plaintiff to occupy a position with him on a heavily laden and insecure cart of the defendant, which broke down and injured the plaintiff, the latter could not recover. *Gillis vs. Penna. R. R.*, 59 Pa., 142.

Walls.

I. NEGLECT BY OPENING WINDOWS. An injunction will not be issued to prevent defendant from putting a window in his wall which would overlook plaintiff's property and destroy its privacy. A different rule applies to party walls in Philadelphia. *Shell vs. Kemmerer*, 13 Phila., 502.

II. NEGLECT BY UNDERMINING. The measure of damages for undermining a neighbor's wall is the cost of remedying the injury. *Lucot vs. Rodgers*, 159 Pa., 58.

III. NEGLECT IN ADVERTISING UPON. One who paints an advertisement of his business upon the wall of another's building, though with the consent of the tenant, is liable to the landlord. *Devlin vs. Snellenburg*, 132 Pa., 186.

Walls—Continued.

IV. NEGLECT IN ERECTING. 1. In an action for damages suffered by reason of a falling wall, the contractor who erected the wall cannot escape liability by shifting the responsibility upon a sub-contractor, when it appears he accepted the work from him, knowing its condition. *Berberich vs. Eback*, 25 W. N., 272. 2. An injunction is the proper remedy to restrain the building of a wall on the plaintiff's premises; he has no adequate redress at law. *Whitman vs. Shoemaker*, 2 Pearson, 320.

V. NEGLECT IN THE FOUNDATION. Where a defendant, intending to build a wall entirely upon his own land, receives inaccurate lines from the city surveyor, and encroaches on his neighbor's land with his foundation stones, but not with the wall above the surface, this is not a party wall; and if the neighbor refuses to permit the defendant to enter upon his lands so as to cut off the projecting ends of the stones, a court of equity will decree him to take down the entire wall. *Pile vs. Pedrick*, 167 Pa., 296.

VI. NEGLECT TO REPAIR. 1. Where one has reason to apprehend danger from the peculiar situation of his property, and its openness to accidents, the rule that where no duty is owed no liability arises, will not avail; but the question of liability must be submitted to the jury. The owner of an out-house abutting on an alley which was an open way to a factory, is liable in damages to a party injured by the falling of the wall into the alley, caused by the owner's neglect to repair. *Schilling vs. Abernethy*, 112 Pa., 437. 2. A party, who has reduced the grade of his lot below that of his neighbor, and supported the abutting ground by a wall, must keep the wall in repair and prevent the plaintiff's ground from falling over into his ground. *Weightman vs. Ruffner*, 22 W. N., 36.

Warehousemen.

I. NEGLECT IN ISSUING RECEIPT. A warehouse receipt, as contemplated by the act of September 24, 1866, must be issued by the person in possession of the goods in his own

Warehousemen—Continued.

right. One who is the servant or agent of the principal, cannot issue such receipt. *People's Bank vs. Gayley*, 92 Pa., 518.

II. NEGLIGENCE IN PRESERVING PROPERTY. A warehouseman is liable only for negligence in preserving the property deposited with him. *McCarty vs. N. Y. & Erie R. R.*, 30 Pa., 247.

III. NEGLIGENCE TO PAY RENT. Goods stored in a warehouse, used for the storage of goods of others, as well as those of the tenant, are not casually liable to distress for rent. *Briggs vs. Large*, 30 Pa., 287.

Warrants.

I. NEGLIGENCE IN DESCRIPTION. An indescriptive warrant gives no title to any particular land, until survey, and therefore none can be seized on execution. *Tryon vs. Munsen*, 77 Pa., 250.

II. NEGLIGENCE IN ISSUING. 1. Since the act of July 8, 1885, a warrant of arrest in a civil case can issue only in the county where the cause of action arises or the judgment has been entered, but the officer may execute it in any county of the state. *Weber vs. Goldberg*, 20 Phila., 194. 27 W. N., 371. 2. A warrant by a justice of the peace not directed to any particular person or officer, will not justify the execution of it. *Hall vs. Moor*, Addison's Rep., 376.

III. NEGLIGENCE OF COUNTY TO PAY. The holder of a warrant or order cannot recover interest even after demand and non-payment for want of funds. The suit should ordinarily be on the original claim, and not upon the warrant. *Allison vs. Juniata Co.*, 50 Pa., 351.

IV. NEGLIGENCE TO CHARGE CRIMINAL OFFENCE. While it is true that where one has been discharged on *habeas corpus*, he cannot again be imprisoned for the same offence by any person or court, yet if he was discharged by reason of the failure of the warrant under which he was held, to charge a criminal offence, he may be again arrested and held under a valid war-

Warrants—Continued.

rant founded on the same transaction. In such case, he is not under custody a second time for the same offence, for the reason that the first arrest was not for any offence at all. *Comm. vs. Little*, 33 W. N., 486.

Warranty.

I. NEGLECT IN WARRANTING TITLE TO LAND. If the vendee knows of a defect in the title to land which he is about to purchase, and does so without requiring a covenant against it, he cannot in the absence of fraud on the part of the vendor, withhold any portion of the purchase money on account of this defect. But where such defect is unknown, the rule is different. *Cadwalader vs. Tryon*, 37 Pa., 318.

II. NEGLECT IN QUALITY OF GOODS. *Assumpsit* will lie on an implied warranty that the article sold shall be fit for the purpose for which it is intended. *Hylton vs. Symes*, 7 Phila., 96. *Taylor vs. North*, 3 W. N., 170. *Iron Co. vs. Fiegel*, 2 W. N., 154. *Freyman vs. Knecht*, *Idem*, 130.

III. NEGLECT IN SALE BY SAMPLE. A sale by sample, in the absence of fraud or circumstances to indicate that the sample was to be taken as the standard of quality, is not an implied warranty of the goods sold. It is a guarantee that the articles shall follow its kind and be simply merchantable. *Boyd vs. Wilson*, 83 Pa., 319.

IV. NEGLECT OF PURCHASER OF GOODS ON INSPECTION. In sales of personal property on inspection, and where the vendee's means of knowledge are equal to the vendor's, the law does not presume a warranty that the thing sold is of the species contemplated by the parties; but if the article be such that the vendor is presumed to have superior knowledge concerning it, there is a warranty that it shall be in kind as represented. *Lord vs. Grow*, 39 Pa., 88.

V. NEGLECT TO CARRY OUT REPRESENTATIONS. In an action upon a warranty, the measure of damages is the difference between the actual value and the value of the thing when sound, and without regard to the price given originally, or

Warranty—Continued.

obtained upon resale. Such price may be used in evidence, whether paid in money or by exchange of other property. *Thompson vs. Burgey*, 36 Pa., 405. *Seigworth vs. Leffel*, 76 Pa., 480.

Waste.

I. NEGLECT IN COMMITTING. An injunction will issue out of chancery, to prevent the commission of waste by one who has but a limited interest in or possession of the property, and when the acts about to be done will work a lasting injury to the inheritance. So also will an injunction issue to stay waste against a tenant from year to year or for a longer period, where he does not farm the premises in a husband-like manner, and is thereby committing waste. Nor is such tenant permitted to remove anything from the land, except those things which he could do according to the custom of the country. *Jones vs. Whitehead*, 1 Parsons, 304.

II. NEGLECT TO ENJOIN. An injunction will not be granted against waste, where the title of the complainant is denied by the answer, and it is refused before answer, unless the defendant has had notice of the motion, so as to enable him to make denial by affidavits. *Morse vs. O'Reilly*, 4 Clark, 75.

III. NEGLECT TO RESTRAIN. An injunction will not be granted to restrain waste where ejectments are pending and the title is in dispute. *Philadelphia vs. Griscom*, 5 Phila., 532.

Water.

I. NEGLECT BY DIVERTING. 1. A landowner cannot so change the natural conformation of his land as to throw in a body, upon his neighbor's land, water which has been accustomed to flow evenly over the surface. *Malin vs. Worrall*, 2 Delaware Co., 15. *Meixwell vs. Morgan*, 149 Pa., 415. 2. The right of the upper landowner to discharge water on the lower lands of his neighbor is a right of flowage only in the natural ways and natural quantities. If he changes the

Water—Continued.

course of the water or concentrates it at a particular point, he becomes liable for any injury caused thereby. *Pfeiffer vs. Brown*, 165 Pa., 267. 3. The diversion by a landowner of surface water collecting on his land from rain and melting snow, out of the course which nature has provided for it, in such a way as to cause it to flow upon the land of another where it has not flowed before, is an additional trespass, and such landowner is liable to the abutting owner in damages for the resulting injuries. *Rhoads vs. Davidheiser*, 133 Pa., 226. *Torrey vs. Scranton City*, *Idem*, 173. 4. The natural flow of water from a higher to a lower lot does not, as a general rule, give a cause of action to one injured thereby. In the present case, the water from the adjoining premises percolated through the soil into the cellar of the plaintiff's house, owing to a change in the direction of the spouting upon the defendant's roof. Held, that this was a *damnum absque injuriâ*, and the plaintiff was properly nonsuited. *Sowers vs. Lowe*, 20 W. N., 76. 5. A municipal corporation is liable for changing, by the digging of ditches for that purpose, the natural course of the water collecting on the streets, and thereby throwing it on the land of a private owner, even if the consent of an intermediate owner be obtained. *Weir vs. Plymouth*, 148 Pa., 566. 5. A justice of the peace has no jurisdiction in an action brought for the alleged negligence of the defendant, in not preventing surface water from flowing from his own land upon that of the defendant. *Youngblood vs. Folkner*, 2 Kulp, 429.

II. NEGLIGENCE BY POLLUTING. A privy well which pollutes the water of a neighbor's well, is a continuing nuisance, which may be remedied by injunction. *Haugh's Appeal*, 2 Walker, 376.

III. NEGLIGENCE BY OBSTRUCTING. Where surface water has for a long time flowed in a channel, the owner of the land upon which the channel is situate has no right to obstruct the same or to make ditches or drains therefrom, so as to cause the water to flow upon his neighbor's land. *Davidheiser vs. Rhoads*, 25 W. N., 513.

Water—Continued.

IV. NEGLIGENCE IN DRAINING. 1. Where a borough constructs gutters in a street in such a way as to cause the surface water to be diverted from its natural flow and precipitated on the premises of an abutting owner to his injury, the borough is liable in damages. *Bohan vs. Avoca*, 154 Pa., 404. 2. If, by the neglect of a municipal corporation, water is unlawfully thrown upon the land of a party, he cannot in turn cast it on the land of his neighbor, so as to give the latter a cause of action against the corporation. *Costello vs. Conshohocken*, 6 Montgomery Co., 103. 3. The measure of damages in cases of trespass by water flowing from a public highway, is the cost of remedying the injury, unless that equals or exceeds the value of the thing injured. *Eshleman vs. Martie*, 152 Pa., 68. 4. In an action against a borough to recover damages for injury to land caused by flooding, where there is evidence that the borough, in opening a street, increased the natural flowage, the case should be submitted to a jury. *Frederick vs. Lansdale*, 156 Pa., 613. 5. A municipality cannot collect surface waters from its streets into an artificial channel and discharge it upon private land, without just compensation first paid or secured. *Goulden vs. Scranton*, 3 Lancaster Review, 340. 6. A municipal corporation is not liable in damages for an error of judgment of its officers in providing means to carry off surface water, even though they obstruct the natural drainage. *Kennedy vs. Pittsburg*, 31 Pittsburg Journal, 230. 7. It seems, that a borough is not liable in a civil action for a failure to provide a system of drainage, which will prevent the flow of surface water upon property lying below the level of a street or road. *Lafferty vs. Girard Borough*, 1 Monaghan, 513. *Buchert vs. Boyertown*, Idem, 577. 8. The owner of land on a higher level has a right to lay artificial drains on his land to carry off the ordinary rainfall at one point upon the land of his neighbor at a lower level, where that point is the natural watershed for both tracts, provided the water from the drains does not materially increase the flow of water upon the land of the lower owner and work

Water—Continued.

injury to him. *Meixell vs. Morgan*, 149 Pa., 415. 9. Defendants, in the process of mining coal, pumped mine water to the surface, whence it flowed over the lands of a lower riparian owner. If he was injured thereby, he might recover damages. *Sanderson vs. Coal Co.*, 7 **Luzerne Register**, 111. 10. Each party must take care of the water falling or arising on his property, and keep it off the property of another. *Scott vs. Allender*, 23 **Pittsburg Journal**, 74. 11. Where two adjacent properties, one improved and the other unimproved, lie below the grade of the street, the owner of the unimproved lot is not liable in damages for the natural flow of surface water from his lot into the adjacent cellar. *Sentner vs. Tees*, 132 Pa., 216. 12. Where a municipality, in the grading of its streets, throws a body of water upon private property, which would not naturally have flowed there, it is liable for damages. *Torrey vs. Scranton*, 1 **Lackawanna Jurist**, 307. 13. An owner of property in a township has no right of action against an adjoining borough for throwing water collected by freshets upon the township. The latter township, having accepted the burden of water from the borough, is liable for damage done to owners of property in its limits by reason of such want of care. *West Bellevue vs. Huddleston*, 23 **W. N.**, 240. 14. A municipality is liable in damages to a property holder, if it directs the natural drainage along the highways, and in consequence an accumulation of water is carried past natural outlets and thrown on his lands. *West Bellevue vs. Huddleston*, 36 **Pittsburg Journal**, 297. 15. The owner of a city lot elevated above the adjoining lot, is bound to see that the rain falling upon his lot is carried away from his neighbor's property. Where he chokes up the drain provided for that purpose, he is responsible for the injury maintained. *Whitney vs. Sanders*, 3 **Pittsburg**, 226.

V. NEGLECT IN USING. A riparian owner has the right to use water for ordinary, reasonable, domestic purposes, even if that use consumes all the water during the dry season. *Slack vs. Marsh*, 11 **Phila.**, 543.

Water—Continued.

VI. NEGLECT TO CHECK THE FLOW OF. 1. Where the upper story of a building had water introduced into it, with a vent by a spigot, which was under control of the occupant of such story, it was his duty to prevent it flooding the floors below. A person, though not in his employ, coming to the room of the occupant with his permission, was not a trespasser, and it was negligence on the part of the occupant not to see to the condition of the spigot before the store was closed. *Killion vs. Power*, 51 Pa., 429. 2. A bill in equity praying for an injunction against an alleged nuisance, consisting of the percolation into the plaintiff's cellar of water from the defendant's premises, and for damages, should be dismissed, when the facts indicate that such percolation results from natural causes, and not from any act or default of the defendant. *Mirkil vs. Morgan*, 134 Pa., 144. 3. Evidence that water ran from defendant's hydrant into plaintiff's apartment, is sufficient proof of negligence. *Warren vs. Kauffman*, 2 Phila., 259.

VII. NEGLECT TO SUPPLY. 1. Under an act empowering a city to construct reservoirs, the city could not be held liable for loss resulting from fire, which might have been checked had the neighboring reservoir been in suitable condition to hold water. It was discretionary with the city to maintain the reservoir. *Grant vs. Erie*, 69 Pa., 420. 2. In an action for damages for cutting a water supply pipe, the plaintiff is entitled to damages sufficient to compensate him for supplying the water, and the cost occasioned by the deprivation of water from the time it was cut off. *Reynolds vs. Braithwaite*, 25 W. N., 269. 3. A citizen has no right to sue a water company for not furnishing sufficient water to quench a fire at his premises. The contract is between the company and the borough. *Stone vs. Water Co.*, 16 Pa. County, 328.

VIII. NEGLECT TO PURIFY. In an action brought by a tenant against his landlord to recover damages for illness of members of his family, caused, as alleged, by the impure condition of the water on the premises, which the landlord had

Water—Continued.

represented to be naturally good, held, that in order to recover, the plaintiff must show that the sickness was caused by the unwholesome condition of the water, and that the landlord knowingly deceived plaintiff in his representations about it. *Harrington vs. Hamill*, 3 Montgomery Co., 31.

Water Companies.

I. NEGLECT TO SUPPLY WATER. 1. A water company supplying citizens with water, may cut off the supply in order to enforce payment of arrears of water rent. *Brumm's Appeal*, 22 W. N., 137. *Comm. vs. Water Works, Idem*, 429. 2. In an action against a water company for negligence in supplying impure water to its customers, resulting, as was alleged, in the sickness and death of the plaintiff's children from disease, a nonsuit will be ordered, unless there be proof of culpable negligence. *Buckingham vs. Water Co.*, 142 Pa., 221.

Water Courses.

I. NEGLECT BY CORRUPTING. Where works were erected on the waters of a stream in a county, which corrupted the waters in another county, held, the indictment could be sustained in the former county. *Comm vs. Lyons*, 1 Clark, 497.

II. NEGLECT BY DRAINING. The owner of land through which a stream flows may increase the volume of water therein by draining into it, but he cannot, by artificial channel, drain water standing upon his own land upon that of another. *Miller vs. Laubach*, 47 Pa., 154.

III. NEGLECT BY INTERFERENCE. Equity will exercise jurisdiction, where injuries arise from unlawful interference, with a water course. *Bolton vs. Schwartz*, 4 Montgomery Co., 198.

IV. NEGLECT BY OBSTRUCTING. 1. The charter of a boom company provided, that if any person should suffer damage by the exercise of powers granted, the court should appoint three viewers to ascertain the damage. The boom became so filled with logs as to obstruct the stream and overflow the plaintiff's land. This was not a case of mere conse-

Water Courses—Continued.

quential damages, for which an improvement corporation is not responsible, unless the liability is imposed as a part of the franchise. *Bald Eagle Boom Co. vs. Sanderson*, 81x Pa., 402. *White Deer Co. vs. Sussaman*, 67 Pa., 415. 2. In an action of trespass for injury caused by the obstruction of a natural water course, so that water was backed upon plaintiff's land, the case is for the jury. If a landowner maintains the channel of a stream on his land in a condition to carry off safely the ordinary flow of water in ordinary freshets, he will not be responsible for any increased flow of water on an upper riparian owner's land, caused by the act of any lower riparian owner in obstructing the channel. *Bierer vs. Hurst*, 155 Pa., 523. 3. While a riparian owner has the right to use the land between high and low water mark, he has no right to erect permanent structures on the land, which will interfere with the right of the public to moor at any part at high water. *Comm. vs. Christian Ass'n*, 169 Pa., 24. 4. An action will lie to recover damages for obstructing the natural flow of water, whereby it is prevented from discharging from the lands of plaintiff to the lands of defendant. *Glass vs. Fritz*, 148 Pa., 324. 5. The owner below the line of a riparian proprietor, cannot subtract from the proprietor above by swelling or backing the water upon him. The stream must be so used and enjoyed, as not to encroach upon the rights of neighboring proprietors. *Good vs. Dodge*, 3 Pittsburg, 557. 6. A party living on the side of a stream, is entitled to a reasonable use of the water for operating his mill, and storage of logs, without any undue obstruction or check by the owners of mills above. The latter are not liable in damages for such interruption of the water as necessarily resulted from its reasonable use. *Horton vs. Hall*, 1 Pennypacker, 165. 7. After an uninterrupted adverse enjoyment of an easement on the land of another for more than twenty-one years, a grant of the privilege thus exercised will be assumed. A party who claims, by reason of long usage, to obstruct the flow of the water through his land to the injury of a lower mill owner,

Water Courses—Continued.

must prove that such obstruction has been continued, exclusive, and with the acquiescence of the owner of the land, for twenty-one years. *Jones vs. Crow*, 32 Pa., 398. 8. The plaintiffs declared for injury to their mills and water power by a coal company filling up the stream with dirt, so that the works had to be abandoned. Held, that the evidence of the value of improvements erected on the property on which the works stood was relevant. *Little Schuylkill Navig. Co. vs. French*, 81x Pa., 366. 9. The rule as to subterranean water courses, is that wherever the stream is so hidden in the earth that the course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent landowner to have an uninterrupted flow of such stream through the land of his neighbor. *Lybe vs. Herr*, 2 Delaware Co., 213. 10. An owner laid out land in town lots and streets, one of these streets being a public road. Held, that the purchaser of a lot would have the right to drain his lot upon the road. In an action for obstructing the flow of water from the plaintiff's lot, the court held, that if an embankment in the public road only obstructed in case of extraordinary floods, which are out of the course of nature and are the act of God, it should be endured without complaint. *Young vs. Leedom*, 67 Pa., 351.

V. NEGLECT BY POLLUTING. 1. The owner of land has the right to use a stream of water running over the land. A city cannot empty a sewer into such stream and pollute it. It may use it for surface drainage only. *Albertson vs. Philadelphia*, 12 W. N., 158. 2. Where the water of an unnavigable stream is rendered muddy and impure, and unfit for domestic purposes by works constructed thereon, the wrong is not done to the public, but solely to the owners of the land below the works, through which the stream passes, and their remedy is by a civil action. *Comm. vs. Lyon*, 1 Pittsburg, 466. 3. The rule that for unavoidable damage to another's land, in the lawful use of one's own, no action can be maintained, does not exempt the landowner from obligation to pay regard to the effect of his operations on subterranean waters. If a person

Water Courses—Continued.

boring for oil or gas knows that neighboring water wells are supplied from a stream of clear water underlying his land, and that there is a deeper stratum of salt water likely to rise and mingle with the fresh, when penetrated in such boring, and may prevent this mingling by a reasonable outlay, his failure to use the available means is negligence. *Collins vs. Gas Co.*, 131 Pa., 143. 4. Where the flow of subterranean water is not hidden, but is known or ascertainable, rights in it will be treated on the same basis as a surface stream. *Collins vs. Gas Co.*, 27 W. N., 217. 5. One who maintains a business on the banks of a river from which the inhabitants of a city obtain their drinking water, in such a manner as to pollute it and render it unwholesome, is indictable under the statute. *Comm. vs. Soulas*, 16 Phila., 523, 525. 6. Ownership of land does not include ownership of the water which flows over or past it. The owner's right to it is to the use of it in common with other owners. It does not carry the right to pollute the stream, to the injury of lower riparian owners, by discharging into it or depositing near it, so that it must necessarily flow into the stream, mine water brought by an artificial way from an entirely different basin. *Gettling vs. Improvement Co.*, 7 Kulp, 493. 7. Where a city constructs a sewer so that its contents empty into and pollute a stream, a party injured is entitled to damages. *Good vs. Altoona*, 162 Pa., 493. 8. By the prior occupation of a stream, an individual does not necessarily gain an exclusive right; he may use the water flowing through his land, but he must so use it as not to injure those through whose land the stream passes. Yet where for a long period of years a party has used a stream for the discharge therein of dyestuffs and other noxious ingredients, he cannot suddenly increase to any extent this discharge, and thus render the water more impure and unfit for use. *Germantown Water Co. vs. McCallum*, 5 Phila., 93. 9. No one has a right so to use water through his land, as to foul or render it corrupt or unhealthy and unfit to be used by the landowner below for domestic purposes. *McCallum vs.*

Water Courses—Continued.

Water Co., 54 Pa., 40. *New Boston Coal Co. vs. Water Co.*, *Idem*, 164. 10. Where the water of a stream which partly supplies a city with drinking water, is polluted by the discharge of refuse from a mill on its bank, equity may perpetually enjoin the proprietors of such mill from emptying, discharging or depositing solid, floating or liquid refuse matter therein. *Philadelphia vs. Carmany*, 18 W. N., 152. 11. One who is engaged in manufacturing coke from coal slack not mined on his own land, is responsible in damages to a lower riparian proprietor for the pollution of a stream as an incident to washing the slack. *Robb vs. Carnegie*, 145 Pa., 324. *Lentz vs. Carnegie*, *Idem*, 612. 12. The measure of damages for polluting a private watercourse is the sum which will compensate the plaintiff for his actual loss by reason of the pollution prior to the institution of his suit. *Sanderson vs. Coal Co.*, 102 Pa., 370. 13. A right of action exists against mine owners for pumping refuse into a mountain stream, and thereby polluting water which flows through the lands of another. *Sanderson vs. Coal Co.*, 86 Pa., 401. 94 Pa., 307. 14. Damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice or negligence, *damnum absque injuriâ*. One operating a coal mine in the usual manner may, upon his own lands, drain or pump the water which percolates into his mine into a stream, though the quantity of water be increased thereby and its quality so affected as to render it unfit for domestic purposes by the lower riparian owners. *Penna. Coal Co. vs. Sanderson*, 113 Pa., 126. 15. Where the defendants threaten to pollute a stream by introducing poisonous substances, riparian owners may obtain an injunction. *Williams vs. Improvement Co.*, 1 Pa. Dist., 288.

VI. NEGLECT IN APPROPRIATING. Every riparian owner has a right to all the enjoyment he can derive from his interest in the stream, provided he exercises that enjoyment in a reasonable manner. *Wilkesbarre Water Co. vs. Navigation Co.*, 3 Kulp, 389.

Water Courses—Continued.

VII. NEGLIGENCE IN CLAIMING OWNERSHIP. While a stream running over the private lands of several adjoining owners may be called a private stream, still there is no such thing as claiming ownership in the flowing water. *Seamans vs. Water Co.*, 1 Lackawanna Jurist, 422.

VIII. NEGLIGENCE IN CONSTRUCTING. Where the lower owner of land obstructs the natural flow of water and damages the land of an upper owner, he is liable in damages. *Sharpe vs. Scheible*, 162 Pa., 341.

IX. NEGLIGENCE IN DIMINISHING. A material diminution of the volume of water by one riparian owner is an infringement of another's right, remediable by injunction. *Wilkesbarre Water Co. vs. Coal Co.*, 3 Lancaster Review, 10.

X. NEGLIGENCE IN DISTURBING. A court of equity may restrain, by injunction, the disturbance of a perpetual water right held by a landowner to have an artificial water course flow into his lands from a neighbor's land. *Bitting's Appeal*, 105 Pa., 517.

XI. NEGLIGENCE IN DIVERTING THE WATER. 1. For a continued obstruction to a flow of water, the party injured could sustain successive actions. In each he could recover the damages he had sustained subsequently to the last preceding action. *Bare vs. Hoffman*, 79 Pa., 78. 2. The owner of upper land has, in lower land, an easement for the discharge of waters, which by nature rise in, flow or fall upon his land, so long as the natural course of the waters is not diverted. It is not the duty of a property owner to make drains across the public road, such duty devolving upon the public authorities. If the authorities did not do so, so as to allow the water to flow in its natural course, and water was conducted by artificial gutters over the road to plaintiff's land, he could not recover. *Bellas vs. Pardoe*, 2 Monaghan, 355. 3. The right of an upper riparian owner to divert the water of a stream for manufacturing or other purposes, having no necessary relation to his use of his land, is limited, as between himself and a lower proprietor, to so much of the water as

Water Courses—Continued.

will not materially or sensibly diminish its quantity. *Clark vs. R. R.*, 145 Pa., 438. 4. A private right must give way to a public improvement. The court will not restrain a canal company from drawing the water from a person's mill, when the water was necessary to feed the canal. The state or companies invested with its privileges, is the sole owner of the water in the streams declared public highways, and can use every drop of it if deemed necessary for the public works. *Cameron Furnace Co. vs. Canal Co.*, 2 Pearson, 208. 5. Every individual residing on the bank of a stream has the right to the use of the water to drink and for the ordinary uses of domestic life. In the case of a river, all the people of the state have access to it; may ride over it and use the water. Not so with a private stream. No one can use it or take the water except at a public crossing. There is no ownership in flowing water; the riparian owner may use it as it flows. *Haupt's Appeal*, 125 Pa., 211. 6. Where for many years the use of water from a stream had been diverted from a mill by a canal company on payment of a stipulated hire, and on the expiration of an agreement with the last owner, it was not renewed, but the use of the water was continued by the company, such continued use was held to be by the power of eminent domain granted to the company by the state, and the owner was entitled to petition for damages. *Heilman vs. Union Canal Co.*, 50 Pa., 268. 7. The owners of lands through which a stream passes have an equal right to the use of its waters, and one may not divert them from their accustomed channel to the injury of his neighbor below. The diversion of a watercourse, the flooding of grounds, or the forcing of water back upon another's land, constitute a nuisance, and where threatened, may be restrained by injunction; but this remedy is to be applied with the utmost precaution. The danger must be impending and imminent, and the effect certain. *Hough vs. Doylestown*, 4 Brewster, 333. 8. An upper landowner has a right to discharge waters which by nature rise in, flow or fall upon his land, upon the lower lands, so long as the natural

Water Courses—Continued.

course of the water or drainage is not diverted. *Hays vs. Hinkelman*, 68 Pa., 324. 9. Where a party has a spring of water upon his land, he has the right to use all the water from the spring, if necessary to the uses of his land, but his neighbor is entitled to have the surplus to its use, and to have it returned to its original channel, if diverted. *Hopper vs. Hopper*, 146 Pa., 365. 10. The measure of damages for diverting a stream, whereby a farm is injured, is the difference in the market value of the property as a farm immediately before the diversion of the stream and immediately afterwards as affected thereby. *Hanover Water Co. vs. Ashland Iron Co.*, 84 Pa., 279. 11. A landowner may not negligently or maliciously divert a stream to the damage of a lower proprietor, but he may drain, mine or quarry, though in so doing he interfere with a flow of water in unknown channels. *Haldeman vs. Bruckhart*, 45 Pa., 514. 12. Where, as the result of digging a well, the flow of water in a neighboring spring is materially diminished, it is *damnum absque injuriâ*. An injury caused to a subterranean supply of water by the lawful acts of the owner of neighboring land, is not the subject of suit. Whenever the water is so hidden that its course cannot be discovered from the surface, there is no prescription in favor of an adjacent proprietor to have an uninterrupted flow of such water through his neighbor's land. *Lybe's Appeal*, 106 Pa., 626. 13. A bill in equity will lie to restrain the owner of a servient tenement from digging a well so near a spring, whose supply depends upon a constant subterranean stream, as to divert the water of the spring, to the injury of the owner of the dominant tenement, who had a reserved right to use the water of the spring. *Lybe vs. Herr*, 1 Kulp, 132. *Bitting's Appeal*, 15 W. N., 45. *Bishop vs. Long*, 2 W. N., 670. *Horn vs. Miller*, 136 Pa., 640. 14. Where a water company, in constructing its works, used the water of a stream to the injury of a mill owner below him, the latter is entitled to compensation for the injury he sustained by the diminution of water.

Water Courses—Continued.

Lycoming Gas Co. vs. Moyer, 99 Pa., 615. 15. A riparian owner may divert water from a stream for the irrigation of his land, but it must be reasonable, having due regard to the condition of other property owners on the stream. But an uninterrupted and exclusive enjoyment of water in any particular way for twenty-one years, affords a presumption of exclusive right. *Messinger's Appeal*, 109 Pa., 285. 16. The upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted and without any essential diminution. *Penna. R. R. vs. Miller*, 112 Pa., 34. 17. When the owner of land, over which runs a stream of water, stands by and permits another to erect works and divert the water of said stream at a heavy expense, without taking any legal steps to prevent it for a period of seven years, he has lost by his laches the right to an injunction to restrain the further diversion of the water. *Penna. R. R. vs. Mullin*, 23 W. N., 503. *Bishop vs. Long*, 2 W. N., 670. 18. Where a statute incorporating a water company permitted it to use such springs or streams as it might select, provided compensation be made to the owners for damages sustained, held, that this act applied not only to the owners of natural channels, but to those who owned artificial water courses in use from time immemorial. *Reading vs. Althouse*, 93 Pa., 400. 19. A riparian owner has the right to use water for ordinary reasonable domestic purposes, even if that use consumes all the water during the dry season. *Slack vs. Marsh*, 23 Pittsburg Journal, 29. 20. In an action for the continuance of the diversion of the waters of a stream, a former proceeding upon the same cause of action and between the same parties, or those under whom they claim, wherever judgment was recorded for the plaintiff, is conclusive of the rights of the parties. The party diverting is liable as long as the diversion is continued. *Schoch vs. Foreman*, 3 Brewster, 157. 21. Underground streams of water, as well as those which flow upon the surface, cannot be diverted or obstructed to the injury of proprietors of other lands

Water Courses—Continued.

through which they flow. Mere percolations of water are on a different footing. They are liable to be disturbed. *Wheatley vs. Baugh*, 4 *Pittsburg Journal*, 452. 22. A riparian owner on a navigable river has no right to the water power, and therefore cannot recover for the loss of such power from obstruction and diversion of water by a neighboring owner, whether above or below low-water mark. But a riparian owner can recover for injury to his property by reason of the diversion of the stream from its natural channel in front of his land; and if malice is shown, exemplary damages may be given. Compensatory damages in such case would be the depreciation in value of the property, if the injury was permanent, or the cost of removing the obstruction. *Williams vs. Fulmer*, 151 *Pa.*, 405. 23. An injury caused to a subterranean supply of water by the lawful acts of an owner of land is *damnum absque injuriâ*, unless the stream is well defined, and its existence known and easily discernible, or the injury be caused by malice or negligence. The right to a reasonable use of water in its natural flow, without any diverting of it from its ordinary channels by artificial means, is incidental to the ownership of lands through which it flows. *Williams vs. Ladew*, 161 *Pa.*, 283. *Webb vs. Improvement Co.*, *Idem*, 628.

XII. NEGLECT OF RIPARIAN OWNERS. 1. Throwing dirt into a stream is a tort; the deposit is only the consequence. Where several collieries located near a stream dump their coal-dirt into the channel, each one is liable for its own act only, and their tort, if several, when committed, did not become joint because the consequences united. *Little Schuylkill Nav. Co. vs. Richards*, 57 *Pa.*, 142. 2. It seems that a riparian owner cannot confer on one who is not a riparian owner any right to use the water of a stream so as to sensibly affect the flow of the same by the lands of other riparian owners. In this case, a riparian owner granted to a railroad company the right to use the water of a stream to supply its engines and a picnic ground. *Wilkesbarre Water Co. vs. Lehigh Navigation Co.*, 14 *Luzerne Register*, 319.

Water Courses—Continued.

XIII. NEGLECT TO CHECK FLOOD. A party whose property is threatened with utter destruction by an extraordinary flood of water, has a right by damming it off. *Limerick Turnpike Co's Appeal*, 80 Pa., 425.

XIV. NEGLECT TO DISCERN. Whenever a stream is so hidden in the earth that its course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor. *Lybe vs. Herr*, 4 Pennypacker, 262. 1 *Lancaster Review*, 105, 389.

XV. NEGLECT TO KEEP CLEAR. In an action by the owners of a water-power against the owner of a tannery higher up the stream, for permitting tan to be conveyed into the plaintiff's pool, evidence both of the value of the land with and without the deposit, and of the cost of removing the deposit is admissible. *Seely vs. Alden*, 61 Pa., 302.

XVI. NEGLECT TO PROPERLY CULVERT. There is no liability on a railroad company for not constructing a culvert so as to pass extraordinary floods. *Pittsburg & Fort Wayne R. R. vs. Gilleland*, 56 Pa., 445.

XVII. NEGLECT TO REMOVE OBSTRUCTIONS. Every land-owner entitled to the use of a stream, is bound to keep his portion of the watercourse in such condition of repair, that the usual amount of water should be transmitted to those below in its ordinary state of purity. *Fleming's Appeal*, 65 Pa., 444.

Water-pipes.

NEGLECT IN LAYING. Where the officers of a city laid the water-mains in the streets so near the surface that the water froze in the mains and the connecting pipes burst, held, that as a result of such negligence, the owners of adjoining properties who were injured by such cause, could recover the water rents paid by them. *Smith vs. Philadelphia*, 81 Pa., 38.

Water Rents.

NEGLECT TO PAY. A party purchasing a property at sheriff's sale is liable for arrears of water rents due. While the neglect of the water officials to enforce the ordinance for the collection of water rents may make them personally liable to the city for any loss by such omission, such neglect cannot be taken advantage of by the owner of the premises. *Girard Life Ins. Co. vs. Philadelphia*, 88 Pa., 393. 4 W. N., 557.

Way.

I. NEGLECT OF RIGHT OF. 1. Whether the use of a way has been open and adverse for twenty-one years is a question for the jury, although concurrently used by the owner of the servient tenement. *Bennett vs. Biddle*, 150 Pa., 420. 2. To entitle the public to a right of way over unenclosed woodland, a continued use by the public for twenty-one years sufficed prior to the act of April 25, 1850, since which time no such right of way shall be acquired by mere user. *Brake vs. Crider*, 107 Pa., 210. 3. An unlocked gate across a passageway at its intersection with a turnpike, and being there at the date of the grant, is not an obstruction to the free use of the passageway. *Connery vs. Brooke*, 20 *Pittsburg Journal*, 208. 4. Where a grantor conveyed land to a party with the use of an alley, which could only be reached by passing over a corner of the premises of the grantor, the right of way is implied and becomes appurtenant to the land conveyed, so long as it cannot be enjoyed otherwise. *Gardner vs. Weaver*, 11 W. N., 544. 5. If the right of way is clear, it need not first be established by a suit at law, nor need the owner prove special damage to entitle him to a decree. Nuisances to rights of way form one of the classes of cases in which the equitable remedy of injunction may be sought. *Hacke's Appeal*, 101 Pa., 245. 6. Where land is subject to a right of way, the owner of the land, for the protection of his fields, may erect a gate across the right of way, provided that he observes a reasonable regard for the convenience of the owner of the right of way. *Hartman vs. Ficks*, 167 Pa., 18. 7. Plaintiff must show a right

Way—Continued.

of passage over defendant's property that is clear before equity will interfere. Where the facts are disputed and the right is not clear, the plaintiff must first establish it at law. *Lieber vs. Bray*, 7 Montgomery Co., 98. 8. When one sells real estate to which there is no possible ingress except by trespassing on the land of strangers, or by crossing adjoining land owned by the vendor, the grant of a right of way is implied. *Mullen vs. Hibberd*, 5 Delaware Co., 10. 9. When the owner of land grants the right of way over his land, he conveys thereby nothing but the right to pass over it. Every other incident of ownership is reserved in the owner of the soil. He has a right to build over it, provided he builds at sufficient height not to interfere with the necessary light for its use. *Patterson vs. R. R.*, 26 W. N., 327. 20 Phila., 295.

II. NEGLECT TO CLAIM RIGHT OF. The mere user of a way by the public for the space of twenty-one years, will not vest a title in them thereto by prescription, unless the user is adverse and under claim of right. Where such user is with the knowledge and acquiescence of the owner of the land traversed, no title by prescription can arise. *Root vs. Comm.*, 98 Pa., 170. *Garrett vs. Jackson*, 20 Pa., 331. *Reiner vs. Stubbs*, *Idem*, 458.

III. NEGLECT TO EXERCISE RIGHT OF. Where a right of way exists by deed, time does not run against it until some default, negligence or acquiescence is shown or may be fairly presumed. There is no prescription or presumption from mere non-user of a servitude. *Butz vs. Ihrie*, 1 Rawle, 218. *Nitzell vs. Paschall*, 3 Rawle, 82. *Bombaugh vs. Miller*, 82 Pa., 209.

Wells.

I. NEGLECT BY POLLUTING. 1. Even if a well of water exists within the limits of a city, a neighbor must not permit the water and filth from his cesspool to percolate into such well, but must cleanse and thoroughly cement the walls and base of his cesspool. *Dill vs. Haugh*, 9 W. N., 417. 2. One

Wells—Continued.

who bores for oil or gas is responsible for an injury to a neighboring water well, where such injury was plainly to be anticipated, and was preventable by the exercise of reasonable care at a reasonable cost. *Collins vs. Gas Co.*, 131 Pa., 143. 139 Pa., 111. *Steele vs. Todd*, 158 Pa., 515. 3. The construction and use of a cesspool or privy, the percolations of which contaminate the water in the well of an adjoining landowner, used for household purposes, is a nuisance *per se*, not justifiable on the ground of necessity. *Haugh's Appeal*, 102 Pa., 42.

II. NEGLIGENCE IN DIGGING. A bill in equity will lie to restrain the owner of a servient tenement from digging a well so near a spring as to divert the water of the spring, to the injury of the owner of the dominant tenement, who had a reserved right to use the water of the spring. *Lybe vs. Herr*, 9 Luzerne Register, 165. 12 Lancaster Bar, 16.

III. NEGLIGENCE TO COVER. Where the cover of a public well was apparently so insecurely fastened, that a child four years old fell into the well together with the cover, and was found dead at its bottom, held, that the proof of the insecure condition of the wall need not be direct and positive by some one who witnessed the occurrence, but it must be such as shall satisfy reasonable minds that it resulted from the negligence of the municipality. *Allen vs. Willard*, 57 Pa., 379.

IV. NEGLIGENCE TO GUARD. 1. Where a well has been sunk on a sidewalk or a public highway by a private party, for the purpose of supplying himself and his neighbors with water, it is the duty of the borough to see that it is properly covered, or enclosed and guarded. *Birmingham vs. Dorer*, 3 Brewster, 69. 2. The owner of unenclosed land is not bound to protect or enclose or guard a well on the premises. A mere passive acquiescence on the part of the owner to the use of or passage over the land by others, does not involve the owner in any liability to them for its unfitness for such use; nor is such owner under obligation to strangers to place guards around excavations on the premises, unless they are so near a public

Wells—Continued.

way as to be dangerous to passers-by. *Gillis vs. R. R.*, 59 Pa., 129. *Gillespie vs. McGowan*, 100 Pa., 144. *Breckenridge vs. Bennett*, 7 Kulp, 95.

V. NEGLECT TO PROTECT. 1. A verdict was rendered against a city, for neglecting to cover a well which existed on a lot acquired by the municipality. It was open to access to persons of all ages, and a child playing on its edge fell in and was drowned. *Barthold vs. Philadelphia*, 154 Pa., 109. 2. An employee in a mill who receives injuries by falling into a concealed well upon the premises, may recover damages from his employer. It was the duty of the employer to warn the servant of the concealed danger. *Clough vs. Hoffman*, 7 Lancaster Review, 74.

Wharfinger.

I. NEGLECT IN DEPOSITING GOODS. Where coal belonging to one party was by mistake deposited on the wharf of another, the wharfinger has no power to sell coal so deposited on his wharf, for unpaid wharfage. *Kusenberg vs. Browne*, 42 Pa., 173.

II. NEGLECT IN THE CARE OF GOODS. A wharfinger's responsibility begins when the goods are delivered on the wharf, and he has, either expressly or by implication, received them. He is responsible for the exercise of ordinary care in securing the property from loss. *Rodgers vs. Stophel*, 32 Pa., 111.

III. NEGLECT IN IMPOSING RESTRICTIONS. Although a wharfinger, who is required to permit the use of his wharves for the loading and unloading of vessels may make rules for the management of his business, yet he cannot impose unreasonable restrictions. *Lincoln vs. Warehousing Co.*, 8 Pa. County, 195.

Wharves.

I. NEGLECT IN CONSTRUCTING. 1. In Pennsylvania, the title of a riparian owner along a navigable stream extends only

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to the low-water line, and such owner has no right to erect a wharf beyond low-water mark. *Elizabeth vs. The Geneva*, 3 Lancaster Review, 134. 2. The court held, that under the grant given to a fishery, any interference with the plaintiff's use of the land in connection with the fishery would entitle him to damages. *Harvey vs. Vandergrift*, 1 W. N., 629. 3. The city is liable for damages occasioned by a projecting beam on one of the city wharves. *Maxwell vs. City*, 7 Phila., 137.

II. NEGLIGENCE IN OBSTRUCTING. 1. The authorities of a city are guilty of negligence in allowing rubbish to remain on one of their wharves, after notice, and if in consequence of such neglect, boats or rafts attached to the wharf are injured, the city is liable in damages. *Allegheny vs. Campbell*, 107 Pa., 530. 2. Where the nuisance was caused by a city sewer, the owner of the wharf is not liable. *City vs. Edwards*, 1 W. N., 182. 3. A city is not liable in consequential damages to the owner of a wharf, because in draining a creek it clogs up the entrance to a wharf. *Malone vs. Philadelphia*, 12 W. N., 326. 4. A city receiving wharfage from vessels, is bound to keep the wharf safe and free from obstructions, and is liable for neglect of this duty in a private suit instituted by any one injured thereby. *Pittsburg vs. The Mary Ann*, 1 Pittsburg Journal, 93. 5. Where two lines of river steamboats have the right of entrance to slips, and of mooring at a wharf, the employees of neither line have a right to moor their boats immediately in front of a slip, so as to prevent the entrance therein of the boats of the other corporation. *Steamboat Co. vs. Steam Ferry Co.*, 81 Pa., 106.

III. NEGLIGENCE IN OCCUPYING. If a berth at a Philadelphia wharf be for the time occupied by a vessel in which the owner or possessor of the wharf has an immediate interest, whether such vessel be loading, discharging or empty, no other vessel can claim a right to occupy that berth. *Lincoln vs. The Volusia*, 4 Clark, 65.

IV. NEGLIGENCE OF FASTENINGS FOR BOATS. If the posts

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of a wharf are insufficient for properly securing boats lying thereat, it is the duty of the city owning the same to add new ones. The city must provide for the high floods that annually occur, but not necessarily for extraordinary ones. *Crawford vs. Allegheny*, 23 W. & N., 141.

V. NEGLECT TO KEEP IN ORDER. The owners of a wharf are responsible for damage to a steamboat, which has paid for wharfage, from projecting piles of iron, which were wrongly allowed to remain on the wharf. *Pittsburg vs. Grier*, 22 Pa., 54.

VI. NEGLECT TO PAY WHARFAGE. Where a vessel has been hired or chartered, the owner is not responsible for wharfage afterwards incurred. The remedy is against the vessel or charterer. *Phila. vs. Naglee*, 1 Ashmead, 37.

VII. NEGLECT TO PERMIT USE OF. Between high and low-water mark the ownership of lands bounded by navigable streams is subject to the public rights of navigation, and hence when the privilege of erecting a wharf is granted, the owner of any vessel may use it, without previous permission, for mooring purposes, at such rate of wharfage, in the absence of a special agreement, as shall be fixed by the port wardens, which officials alone have authority to remove vessels remaining at the wharves an unreasonable time. *Cone's Estate*, 20 Phila., 68. *Lincoln vs. Warehousing Co., Idem*, 217.

VIII. NEGLECT TO PROTECT. Where it was alleged that the negligence consisted in the owners of a wharf not providing cap logs for their pier to prevent carts from being backed into the river, it is competent for the company to show that placing cap logs there would interfere with the loading of vessels. *Phila. & Reading R. R. vs. Ervin*, 89 Pa., 71.

IX. NEGLECT TO REPAIR. 1. Where the owner of a wharf negligently permitted the dock to be in an unsafe condition, he is liable in damages for injury sustained by a barge which was there by his invitation and in pursuance of a contract with him. *Dempsey vs. Iron Co.*, 12 Phila., 314.
2. Wharves extending into navigable rivers are not the prop-

Wharves—Continued.

erty of him who erects them, and persons who fasten vessels to the further end of them are not trespassers. One, however, who secures a license to erect a wharf, is bound to keep it in reasonable and ordinary repair. *Degan vs. Dunlap*, 15 Phila., 69.

Widows.

I. NEGLECT IN CLAIM FOR EXEMPTION. The mere fact that the widow of a decedent neglected to affix her signature to the paper claiming her exemption, will not vitiate the proceedings. *Beaverson's Estate*, 1 York Record, 173.

II. NEGLECT OF INFORMATION AS TO VALUE OF ESTATE. In order that an election by a widow to take under the will of her deceased husband may bind her, it must be made with a knowledge of her rights and of the relative values of the interests between which her choice is to be made, especially where she is called upon to make her election soon after her husband's death. *Woodburn's Estate*, 138 Pa., 606.

III. NEGLECT TO ALLOW EXEMPTION. 1. A widow cannot claim exemption out of the proceeds of her husband's real estate, unless there has been a previous appraisement of the land. *Avery's Estate*, 1 C. P. Reporter, 151. 2. Where the family relation has been dissolved with the acquiescence of the wife, she is not entitled upon the husband's death to the widow's exemption. *Beilstien's Estate*, 36 Pittsburg Journal, 61. 3. Where a widow has made her claim, the fact of her death is of no consequence; her title vests from the date of her demand. *Buddy's Estate*, 7 Pa. County, 466. 4. A widow who remarries before claiming her three hundred dollars exemption, is barred. *Cronan vs. Scranton*, 2 Lackawanna Jurist, 413. 5. A widow's right to claim three hundred dollars exemption is not ousted by her subsequent marriage. The interest of a widow is fixed the moment she becomes a widow, and is not divested by a subsequent marriage. *Comm. vs. Powell*, 51 Pa., 441. *Venus' Estate*, 2 York Record, 196. *Hunt's Appeal*, 3 York

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Record, 120. 6. A husband compelled his wife to leave his house, and they lived apart until his death, nineteen years subsequently. Held, that she was entitled to the widow's exemption. Where the estate consists of money, a demand for an appraisement by the widow is unnecessary. Notice that she claims the exemption suffices. *DeWalt's Estate*, 38 *Pittsburg Journal*, 275. 7. A widow's election to take under her husband's will, is no bar to her claim for exemption. *Farrell's Estate*, 4 W. N., 383. 8. Where two cohabited as husband and wife, with the understanding that license and ceremony should follow, and the man died in the meantime, the survivor was held not entitled to the widow's exemption. *Grimm's Estate*, 35 *Pittsburg Journal*, 213. 9. The widow of a decedent will not be allowed the three hundred dollar exemption, unless she is a resident of this state. *Groves' Estate*, 2 *Delaware Co.*, 476. 10. Failure of a wife to live with her husband up to the time of his death, is no bar to her claim for exemption, if she left him on account of his inability to support her. *Groom's Estate*, 6 *York Record*, 139. 11. The right of a widow to retain \$300 out of the estate of her husband exists, although before doing so a second marriage may have taken place. Wherever a right by law has attached by reason of widowhood, there must be some law by which it is divested, or it will remain. *Hilt vs. Walton*, 12 *Phila.*, 362. 3. W. N., 545. *Myers' Estate*, 18 *Phila.*, 42. 12. A widow who had been divorced *a mensa et thoro*, is not entitled to the three hundred dollar exemption on the death of her husband, under the act of April 14, 1851. To entitle her to this money, the family relation must exist at the husband's death, at least in contemplation of law. *Hettrick vs. Hettrick*, 55 *Pa.*, 290. *Terry's Appeal*, *Idem*, 244. 13. A widow's right to claim three hundred dollars exemption, is not ousted by her subsequent marriage. Where an ante-nuptial contract had been entered into for a consideration, in which the woman had agreed to release all claim to any portion of her husband's estate, held, that on the husband's death, the

Widows—Continued.

widow was not entitled to her three hundred dollars exemption. *Hunt's Appeal*, 30 **Pittsburg Journal**, 77. *Ludwig's Appeal*, **Idem**, 446. 14. The widow of a decedent is not entitled to \$300 under the act of April 14, 1851, out of the proceeds of land situate in another state, brought into Pennsylvania for distribution by the executors. *Hopper's Estate*, 2 **Phila.**, 367. 15. To entitle a widow to her three hundred dollars worth of her husband's property, she must have sustained the relation of his wife at the time of his death. Hence, if she had deserted him or lived separately from him so long as not to be a part of his family, she thereby forfeited her right to his property. *King's Appeal*, 84 **Pa.**, 345. 16. Where a wife, without showing sufficient legal excuse, withdraws from her husband's roof and society, she cannot claim exemption as his widow, for that allowance is based upon the continuance of the family relation which she has by her own act sundered. *Kahn's Estate*, 3 **Pa. Dist.**, 806. 16 **Pa. County**, 72. *Adose vs. Fossitt*, 1 **Pearson**, 304. *Coates' Estate*, 6 **W. N.**, 367. 12. **Phila.**, 171. *Nye's Appeal*, 126 **Pa.**, 341. *Price's Appeal*, 2 **Monaghan**, 554. 17. A widow's claim of three hundred dollars is not barred by her death after advertisement of her petition for exemption, but before its approval. Such claim is not allowed, when originally presented by the personal representative of the widow. *Lafferty's Estate*, 12 **W. N.**, 535. 18. The death of a widow three days after filing her petition for exemption, and before the approval of the appraisement, does not invalidate her claim. *Lafferty's Estate*, 16 **Phila.**, 211. 19. The widow and children of a decedent are entitled, under the act of April 14, 1851, to claim \$300 out of his estate as against a mortgage, not for purchase money, of the land, out of the proceeds of which the benefit is claimed. *Lambert's Estate*, 2 **Woodward's Decisions**, 239. 20. The evidence showing that the husband deserted his wife, she, on his death, is entitled to the benefit of the three hundred dollar exemption, and her share in his estate. *Morris' Appeal*, 31 **Pittsburg**

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Journal, 85. 21. A wife living in a foreign country, who never formed part of her husband's family here, is not entitled to the benefit of the exemption act, allowing \$300 to the widows of decedents. *Monk's Estate*, 9 **Montgomery Co.**, 113. 22. A widow is entitled to her exemption out of the goods of her deceased husband, although they were levied upon by the sheriff before his death. *Meier's Estate*, 6 **Kulp**, 102. 23. A widow is not entitled to receive \$300 out of the proceeds of sale of her deceased husband's real estate, without a previous appraisement, as provided by the act of April 14, 1857, and April 9, 1849. *Nixon's Appeal*, 6 **W. N.**, 496. 24. A widow has a right to claim her three hundred dollar exemption out of her husband's estate, although her husband, by his will, has directed that the legacy bequeathed to her shall be in lieu of dower and exemption, and she has elected to take under the will. *Peeble's Estate*, 157 **Pa.**, 605. 25. The right of a widow to claim her exemption is not affected or measured by her necessities, her wealth or her poverty, nor by the value of the estate. *Palethorp's Estate*, 3 **Pa. Dist.**, 145. 34 **W. N.**, 60. 26. A widow who has deserted her husband, is not entitled to the three hundred dollar exemption. *Ross' Estate*, 3 **Lackawanna Jurist**, 60. 27. Where a husband and wife executed a written agreement to separate, and relinquished their respective rights in each other's estate, and forthwith ceased to cohabit, held, that on the death of the husband the widow was not entitled to the three hundred dollar exemption provided by the act of April 14, 1851, nor to one-third of his personal estate under the intestate laws. *Speidel's Appeal*, 107 **Pa.**, 18. 28. To be entitled to the exemption allowance, the wife should at her husband's death have been living with him, unless the separation be without fault on her part. She should make her claim promptly, or she will be held to have waived it. *Scullin's Estate*, 5 **Pa. County**, 188. *Simpson's Estate*, *Idem*, 326. *Burkett's Estate*, *Idem*, 501. 29. A wife's absence from her husband's domicile through no fault on her part, continuing for some time previous to her

Widows—Continued.

husband's death, does not sever the family relations, nor debar her from claiming the widow's three hundred dollar exemption. *Simpson's Estate*, 22 W. N., 172. *Grieves' Estate*, 11 Lancaster Review, 149. 30. A wife, who, by articles of separation, releases all interest in her husband's estate, will not be allowed the statutory exemption, although the separation never took place. Where, however, a separation has taken place between the parties, though no fault of the wife, but justified by bad treatment, she being willing to live with him and to perform the duties of a wife, held, that she is entitled to claim the exemption of \$300. Otherwise, it is of the very essence of the act of 1851, that, at the time of her husband's death, the wife be living with him in the family relation. *Schmitt's Estate*, 19 Phila., 38. *Simpson's Estate*, *Idem*, 52. *Scullin's Estate*, *Idem*, 36. 31. A widow cannot compel the legal representative of an estate to sell goods so as to give her \$300 in money. *Witmer's Estate*, 2 Pearson, 473.

IV. NEGLECT TO CLAIM ALLOWANCE. A widow who claims her statutory allowance under the act of April 14, 1851, must make her claim within a reasonable time after her husband's death. She cannot claim it after the lapse of several years and a second marriage. *Burk vs. Gleason*, 46 Pa., 297.

V. NEGLECT TO CLAIM EXEMPTION. 1. To entitle the widow of a decedent to \$300 worth of her husband's estate, she must make her claim in proper time. The omission to do so is a waiver of her right. The claim must be made of the executor or administrator. If she elects to take personal property, and it falls short of \$300, she may have the balance out of the real estate. A claim to retain a part of the proceeds of real estate made after the same is sold, is too late. *Bryan's Estate*, 4 Phila., 228. 2. Delay in making this claim can only act as an estoppel, where there are persons having interests, as creditors or distributees, with a present right of participation in the estate, who may have been induced by the widow's inaction to believe that her claim was waived. Her exemption takes precedence over funeral expenses. An

Widows—Continued.

appraisement is not necessary, where the exemption is claimed in cash. In such case, a delay of eleven months in making a claim is not laches. *Bourguignon's Estate*, 28 W. N., 315. *Weir's Estate, Idem*, 268. 3. Where the widow is administratrix, she cannot be accused of laches, if she demands her exemption within one year from taking letters. The death of the widow after her claim is made, and before it is confirmed, is immaterial. Delay on her part in claiming her exemption, acts as an estoppel only where the rights of creditors and distributees are affected. *Buddy's Estate*, 20 Phila., 6. *McCann's Estate, Idem*, 110. *Bourguignon's Estate, Idem*, 143. 4. Laches on the part of a widow to claim her exemption of \$300 will defeat it. If she is administratrix, it is her duty as widow to make a demand upon herself as administratrix. *Buddy's Estate*, 25 W. N., 359. *Donoghue's Estate, Idem*, 40. 5. The right of a widow to retain property to the value of \$300 out of the estate of her deceased husband, is waived, unless claimed before the expenses of a full administration are incurred. By claiming and taking but part, she waives the residue. *Baskin's Appeal*, 38 Pa., 65. 6. Four years' delay is no bar to the widow's claim for exemption, where there are no creditors, and the children, all adults, have consented to her use of the property as her own. Where a widow is executrix or administratrix, she need make no formal demand upon herself for the \$300 allowed her, and, barring laches, the claim may be made at the adjudication of her account. *Cocher's Estate*, 1 Pa. Dist., 81, 158. *Birch's Estate, Idem*, 390. 3. A delay of five years by a widow to assert her claim to exemption, is such gross laches as to operate as conclusive proof of a waiver of her right. *Donoghue's Estate*, 7 Pa. County, 319. *Pratt's Estate*, 23 W. N., 543. 8. The claim to the exemption of \$300, under the act of 1851, whether by a widow or by a guardian of minor children of a decedent, should be made promptly and without unreasonable delay. Otherwise the party entitled will be estopped. *Donoghue's Estate*, 19 Phila., 220. 9. A widow waives her right to claim

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her exemption by a delay of three years in making the demand, as against a purchaser at a sheriff's sale on an execution issued against the decedent. *Davey's Estate*, 9 Pa. County, 125. 10. A widow must make her claim for the three hundred dollar exemption before the sale of the real estate of a decedent. *Cranse's Estate*, 6 Phila., 71. *Dech's Estate*, *Idem*, 72. *Wagenhal's Estate*, 15 Phila., 617. *Weckerley's Estate*, *Idem*, 527. 11. A widow, electing to take her exemption from the realty, cannot subsequently come in upon the personalty. A judgment given to secure part of the purchase-money for real estate is preferred to the widow's exemption. *Engel's Estate*, 4 Northampton Co., 198. 12. Where a widow in her lifetime has designated the particular property she elected to retain, her representatives must be restricted to such designation. *Finney's Appeal*, 17 W. N., 494. 13. A widow is not entitled to \$300 out of the proceeds of chattels sold by the executors, without a previous demand of chattels sold. *Frans's Estate*, 27 Pittsburg Journal, 119. 14. To secure the exemption allowed by law, the widow must reside within the limits of the state. She must make her demand within a reasonable time; if she delays until the full expenses of administration have been incurred, it is too late. *Grove's Estate*, 3 Kulp, 475. 15. A widow will not be held to have waived her right to the exemption under the act of 1851, by a delay of a year in presenting her claim, where there are no creditors, and when the interests of legatees are not prejudiced thereby. *Hurley's Estate*, 12 Phila., 47. 16. It is the duty of a widow to make her claim to the benefit of the exemption law promptly. It is too late after distribution awarded of the estate. *Hunt's Estate*, 14 Phila., 330. *Catteson's Appeal*, 100 Pa., 9. *Wallington's Estate*, 7 W. N., 489. 17. A claim made by a widow for \$300 out of the estate of her late husband, six years after his death is too late, even if administration was not granted on the estate until after five years. *Hughes' Estate*, 1 Lackawanna Jurist, 85. 18. The widow in claiming her exemption under the act of 1851,

Widows—Continued.

should give notice of her claim to the executor at or before the appraisement of the estate is made, if she wants to take it out of the personal estate. *Heller's Estate*, 11 Phila., 120.

19. If a widow be tardy in claiming her exemption, and lead a creditor to incur costs and expense, which he would not otherwise incur, she, by her laches, will be deprived of the exemption. *Scullin's Estate*, 19 Phila., 36. *Hurley's Estate*, 5 W. N., 501. *McMullin's Estate*, 11 W. N., 546, 562. *Rizer's Estate*, *Idem*, 563. *Hunt's Estate*, *Idem*, 123. *Weckerly's Estate*, *Idem*, 287.

20. A delay of three years, on the part of a widow, to assert her claim for the three hundred dollar exemption under the act of April 14, 1851, is fatal to the right, and conclusive evidence of her waiver of it. *Kern's Appeal*, 120 Pa., 523. *Fox's Estate*, 5 Kulp, 218.

21. Where the interests of other parties are not affected by the delay, the estate being all in money in the hands of the executor, the widow making her claim for \$300 before the auditor is not too late. But she is too late, if she delays to make it and claim an appraisement until the assets are all otherwise appropriated. *Kirkpatrick's Estate*, 5 Phila., 98. *Tibbin's Estate*, *Idem*, 100.

22. Delay by a widow in asserting her right to exemption is evidence of waiver, and if prolonged unduly, or until circumstances have changed or new rights intervened, it may operate as an estoppel. It is, however, susceptible of explanation, and if no one has been prejudiced by it, the exemption may still be awarded. *Kelly's Estate*, 3 Pa. Dist., 15.

23. Where the lands of a decedent are incapable of division, the widow's \$300 is payable out of the proceeds of sale, although demand was not made before sale. *Lehman vs. Dorety*, 8 Phila., 623.

24. A widow is too late in her claim to have three hundred dollars in value set apart to her out of the real estate of decedent, after the administrator has sold the same at public sale under an order of the orphans' court for the payment of his debts. *Lawley's Estate*, 2 Montgomery Co., 56. 3 *Idem*, 78.

25. To entitle a widow to three hundred dollars' worth of property, she must make the claim at the proper time. If

Widows—Continued.

she waits until the administrator has actually sold the property of the decedent for the payment of his debts, her claim is made too late, although made before the confirmation of the sale. The claim will not be allowed, when the interests of third parties are affected by the delay. *Lawley's Appeal*, 20 W. N., 28. *Silvers' Estate*, *Idem*, 389. 26. A widow's claim for exemption made within ten months after her husband's death, where no interests have been prejudiced, is not barred upon the ground of laches. This right is not confined to the widow or minor children of the decedent, but is to be participated in by even adult children forming part of decedent's household at the time of his death. *McCann's Estate*, 27 W. N., 439. *Halbe's Estate*, *Idem*, 440. 27. A widow may by laches lose her right to have three hundred dollars' worth of her husband's estate set apart for her. *McLaughlin's Estate*, 4 Lancaster Review, 410. 28. A widow can claim her exemption upon the audit of the estate, if there are no creditors affected by it. *Potts' Appeal*, 3 Walker, 135. 29. A petition of a widow for three hundred dollars exemption is in time, even if filed after an order of sale of real estate has been granted. *Rank's Estate*, 5 W. N., 556. 30. A widow cannot withhold her claim until the personal property is exhausted, and then require the administrator to appraise and set over to her real estate, without the previous steps necessary to bring such estate into administration. *Scott's Estate*, 2 Phila., 136. 31. A widow's claim for exemption will always be refused when not made promptly, if other interests are affected. It is too late, if she waits until the amount is awarded to the creditors. *Silvius' Estate*, 18 Phila., 133. *Robert's Estate*, *Idem*, 119. 32. A delay of two and a half years by the widow in demanding her exemption, is not necessarily an evidence of waiver, yet unreasonable delay, without satisfactory explanation, will defeat her right to it. *Snider's Estate*, 16 Pa. County, 238. *Neill vs. Kuhn*, 15 *Idem*, 565. 33. A widow's waiver of her right to the exemption allowed her out of her husband's estate, should never be inferred from facts that are susceptible

Widows—Continued.

of other reasonable explanation, and do not amount to a legal estoppel. *Wessel's Appeal*, 35 *Pittsburg Journal*, 306. 4 *Pennypacker*, 236. 34. The act of April 14, 1831, allows three hundred dollars exemption to the widow or children of a decedent. If there be a widow, the entire amount must be paid to her, without respect to the children. The right is a personal privilege which she may waive. It is waived, if she neglect to demand an appraisement. The demand to have it set apart must be made before a sale, and before expenses have been incurred in proceedings to effect a sale. *Williams' Appeal*, 92 Pa., 71.

VI. NEGLECT TO DEMAND APPRAISEMENT. 1. An appraisement is essential as to real estate or personal chattels. A widow may, without appraising it, select cash or choses in action easily convertible into cash. A widow may not wait until the estate has been itself converted, and then claim out of a fund which did not before exist. *Formad's Estate*, 3 Pa. Dist., 13. 2. When a widow has failed to demand an appraisement of personal property belonging to her late husband, under the exemption law, until after an appraisement of all the effects was completed and returned to the register's office, it was held that she was too late, and was precluded. *Maier's Estate*, 1 Pearson, 420. 3. To entitle a widow to the benefit of exemption, an appraisement is a *sine qua non*. *Torstenson's Estate*, 3 Pa. County, 13. *Weckerly's Estate*, 15 Phila., 527. *Wagenthal's Estate*, *Idem*, 617. 4. Omission to demand an appraisement, is a fatal defect in a widow's claim for exemption. It may, however, under some circumstances, be the executor's duty to have the appraisement made. *Somers' Estate*, 14 Phila., 261. *Andress' Estate*, *Idem*, 363.

VII. NEGLECT TO ELECT TO TAKE UNDER THE WILL.

1. The act of March 29, 1832, gives the widow twelve months to make her election, whether she will accept the provision made her by her husband's will, or take her dower in the lands and her share of the personal estate. She should make such election with a full knowledge of her rights. *Anderson's Appeal*, 36 Pa., 476. 2. An election by a widow to take

Widows—Continued.

under her husband's will in lieu of dower at law may be evidence by matter *in pais* as well as of record ; but it must be shown that she had requisite knowledge of the value and character of her husband's estate, and that her intention was consistent with such choice. But if, with such knowledge, she receives the bequests in the will, she cannot afterwards claim that she did not intend to relinquish her dower. *Bradford's vs. Kents*, 43 Pa., 474. *Holt's Estate*, 39 Pittsburg Journal, 394. 3. A widow having given notice of her intention to take against the will, it is still within the discretion of the auditing judge up to the time of adjudication to permit her to withdraw her election. *Barry's Estate*, 13 Phila., 310. 4. The right given by statute to elect not to take under her husband's will is purely personal, and in the event of her death without having exercised said right, her heirs or personal representatives cannot make the election. *Crosier's Appeal*, 90 Pa., 384. 5. A widow cannot be compelled to make her election before the expiration of a year, nor can the executors be forced to file a statement before that time. *Farrel's Estate*, 2 W. N., 243. 6. Where a widow, about three months after the death of her husband, delivered a notice in writing to the executors, of her election not to take under his will, it was held to be in time. She was not bound to file a copy of the notice of record, nor forthwith resort to active legal proceedings to have her portion of the estate set off to her. *Greiner's Appeal*, 103 Pa., 91. *Lang's Estate*, 15 Phila., 593. 14 Lancaster Bar, 110.

VIII. NEGLECT TO INCLUDE PROPERTY IN APPRAISEMENT.

Neglect to include property in an appraisement, is a waiver of a widow's claim as to property omitted, and it is too late to make the claim out of the proceeds of real estate. *Nixon's Appeal*, 1 Luzerne Law Times, 135. 8 Luzerne Register, 135.

IX. NEGLECT TO PERMIT ELECTION UNDER WILL. A widow's right to an election, under the act of April 14, 1851, is not waived where the husband deserted the wife, and she married again under belief of his death. *Johnson's Estate*, 20 Phila., 170.

Widows—Continued.

X. NEGLECT TO REFUSE EXEMPTION. The widow of a decedent is entitled to \$300 out of the proceeds of the sale of the real estate in preference to a judgment creditor in whose favor the husband had waived the benefit of the exemption. *Spencer's Appeal*, 4 *Pittsburg Journal*, 693.

Wills.

I. NEGLECT BY ADDITIONS, ALTERATIONS, ERASURES AND INTERLINEATIONS. 1. Where a will is executed with all the forms of law, it will not be invalidated by subsequent additions thereto by the testator which are not signed by him ; but the said additions will be considered as an unexecuted codicil, and the will, as originally written, allowed to stand. This rule does not apply, where the whole instrument was prepared at the same time. In such case, not signing at the end is fatal. *Baird's Estate*, 35 W. N., 15. 2. When one of the subscribing witnesses testified on the trial of the issue, that the will offered for probate had been altered after he had subscribed, he contradicted the *prima facie* evidence of the probate, which left the altered paper unproved, it standing on the testimony of the other subscribing witness only. *Charles vs. Huber*, 78 Pa., 451. 3. An erasure and careful interlineation in an executed will made by the testator or at his request, and acknowledged by him as thus altered in the presence of two witnesses, is not a revocation of the will. *Dixon's Appeal*, 55 Pa., 424. 4. Where immaterial additions are made to a will by a stranger, such as affixing a seal thereto, or adding the words, " his mark," these alterations do not affect the validity of the will. *Grubbs vs. McDonald*, 91 Pa., 236. 5. A testator partly erased his will, and made corrections in it in lead pencil, in the presence of his brother. Held, that the will was properly admitted to probate. Where a will so erased and altered is found in a desk, safe or other receptacle for a testator's private papers, the presumption is that the changes were made by the party himself. The law declares that a will shall be in writing, but whether, if written with pencil, a will would

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thereby be invalid, has never, we believe, been decided by our supreme court. *Fuguet's Will*, 11 Phila., 77. 6. Where a will is found in a receptacle where the testator himself placed it, erasures or alterations which appear on its face are presumed to have been made by him. The opposite view is taken in England, where it is presumed that such alterations, if not attested, were made after the execution of the will. Where the body of the will is admittedly in the testator's handwriting, it is for the jury to compare the interlineation, and say whether it was not written by him. Experts are not competent to make such comparison. *Glassen's Estate*, 13 W. N., 79. 16 Phila., 219. 7. A duly executed codicil operates as a republication of the original will, so as to make it speak as of the date of the codicil. Where interlineations exist in a will proved to be in the handwriting of the testator, the presumption is that they were made at or before the time the signature was appended to the last codicil. *Linnard's Appeal*, 93 Pa., 313. 8. Where undoubtedly the erasures and alteration of bequests in a will were made by the testator, the court will construe such bequests revoked or changed. Where expressions are ambiguous, no priority can be allowed. *Linnara's Estate*, 8 W. N., 77. 9. Where, after a will was executed and attested, the daughter of the testatrix made erasures, as she alleged, at the request of her mother, but without the knowledge of the subscribing witnesses, and without republication of the will by the testatrix, held, that the statutory proof was lacking, and the original will, without the erasures, should be admitted to probate. *Simrell's Estate*, 154 Pa., 604. 10. If erasures in a will be not made by the authority of the testator, the whole will stands as originally written. *Simrell's Estate*, 2 Lackawanna Jurist, 405. 11. Alterations in a will made by the testator with a lead pencil, signify the same intent and have the same effect as if they were in ink. *Tomlinson's Estate*, 133 Pa., 245. 12. The presumption in regard to deeds is, in general, that interlineations, erasures or alterations, when nothing to the contrary

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appears, is that they were made contemporaneously with their execution. But no such presumption arises in the case of wills. Where such changes were made by a testator after he had signed the will, it is reasonably presumed that they were made with a view to its republication during his lifetime. *Whitehill's Will*, 1 Lancaster Bar, No. 33. 13. It is not essential to the validity of a will, that the different parts of it be physically connected, if joined by their internal sense. Where interlineations or erasures are made, and no mention of them is stated at the time of execution, they are presumed to have been made prior to the act of execution. *Wikoff's Appeal*, 15 Pa., 289.

II. NEGLECT BY MUTILATION. 1. Revocation of a will *pro tanto*, embraces all that part of the will which is either totally destroyed and prevented by the alienation, or so far mutilated and impaired as to remove from the remnant the trace or impress of the testator's intent. *Marshall vs. Marshall*, 11 Pa., 430. 2. Mutilation of a will by cutting out a portion of a line, leaving the signature intact, and the sense perfectly plain, is not *prima facie* a revocation, but is in the nature of an erasure subsequent to execution. *Ramsey's Will*, 2 Pa. Dist., 425.

III. NEGLECT BY SUPPLYING WORDS. 1. Where, from the entire will, it appears that the testator intended to use omitted words, they may be supplied. *Horner's Estate*, 3 Montgomery Co., 155. *Spencer's Account*, 3 Delaware Co., 341. 2. Where the testator's intention is evident, but is incorrectly expressed, the court will supply words to express such intention. *Holland's Estate*, 6 W. N., 469. 3. Words cannot be supplied in a will, unless it is evident there has been an omission, and it is clear what the precise omission is. *Murgitroyd's Estate*, 1 Brewster, 317. 4. The words "heir, issue, children," may be used interchangeably to effectuate the intention of the testator. *Blair vs. Miller*, 12 Lancaster Bar, 15. 5. Names of devisees may be supplied to effectuate the intention of the testator. *Rohrman's Estate*, 10 Lancaster Bar, 2.

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6. Words can only be supplied in a will where they are necessary to give effect to the clear purposes of a testator, otherwise no change will be made. In a doubtful case, courts should adhere, as closely as the language will permit, to the general rules of inheritance. *Varner's Appeal*, 87 Pa., 423.

IV. NEGLECT BY UNCERTAINTY. A will which contains no intelligible devise, is void for uncertainty; parol evidence is not admissible to explain the meaning of the testator. *Kelley vs. Kelley*, 25 Pa., 460.

V. NEGLECT BY UNDUE INFLUENCE. 1. Where a testator, who is aged, infirm bodily, with mental faculties impaired somewhat, executes a will under suggestions of a confidential adviser, who is a beneficiary under the will, the burden is on the beneficiary to rebut the presumption of undue influence. *Armor's Estate*, 154 Pa., 517. *Cuthbertson's Appeal*, 97 Pa., 171. *Smith's Estate*, 34 W. N., 103. 2. A will is not invalid on the ground that the testator was importuned to make it. *Cameron's Estate*, 3 Pa. Dist., 101. 3. The undue influence which will avoid a will, must be such as to destroy the free agency of the testator at the time the instrument is made; it must be a present constraint operating on the mind at the time of making the instrument. *Connell's Estate*, 18 Phila., 241. *Marshall's Estate*, 15 W. N., 284. *Rea's Estate*, 11 W. N., 77. *Blum vs. Hartman*, 115 Pa., 32. *Wilson vs. Mitchell*, 12 W. N., 441. *Eddy's Estate*, 14 W. N., 551. 4. Where a testator, when in undoubted health of body and mind, executed a will bequeathing his property to relations, and subsequently when aged and in pain executes another will through the procurement of a trusted friend and adviser, whereby the provisions of the former will are radically altered, and a substantial benefit given to such adviser, the court should grant an issue to determine whether undue influence had been exerted. *Cuthbertson's Appeal*, 97 Pa., 163. *Wilson's Appeal*, *Idem*, 545. *Yardley vs. Cuthbertson*, 108 Pa., 395. 5. The amount of undue influence which will suffice to invalidate a will must, of course, vary with the strength

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or weakness of the mind of the testator. The influence which would control a mind naturally weak, or one which had become impaired by age, sickness or intemperance, might have no effect to overcome a mind naturally strong. The influence that will vitiate a will, must be such as in some degree to destroy the free agency of the testator. *Heilburn's Estate*, 20 Phila., 104. 6. Undue influence exists wherever, through weakness, ignorance, dependence or implicit reliance of one on the good faith of another, the latter obtains an ascendancy, which prevents the former from exercising an unbiased judgment. To affect a will, it must, in a measure, destroy free agency, and must operate on the mind of the testator at the time of making the will. *Herster vs. Herster*, 122 Pa., 239. 7. When the principal devisee and the testator reside together, a confidential relation exists, so that undue influence secretly exercised is especially possible, but the evidence of it must be of a convincing character. *Herster vs. Herster*, 116 Pa., 612. 8. To establish undue influence over a testator, two points must be sustained: first, that undue influence was exercised, and second, that it produced the alleged result. Undue influence will not be presumed by reason of gross inequalities in wills. *Herster vs. Herster*, 3 C. P. Reporter, 89. 9. The undue influence which will invalidate a will, does not consist in care or attention, or even in fair solicitations by the party in whose favor it was made; there must have been fraud or force employed, depriving the testator of his free agency. *Leech vs. Leech*, 5 Clark, 86. 21 Phila., 244. 10. Undue influence which will affect the provisions of a testament, must be such as to subjugate the mind of the testator to the will of the person operating upon it, and proof must be shown of fraud practiced, threats or misrepresentations made, undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator, and these influences must be proved to have operated at the very time of making the will. *Stokes vs. Miller*, 10 W. N., 241. *Frost vs. Dingler*, 118 Pa., 259. *Murray's Estate*, 1 Pa. Dist., 216. 11. To establish undue

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influence, there must be proof of fraud, threats or misrepresentations, undue flattery, or physical or moral coercion, so as to destroy the testator's free agency operating as a present constraint at the making of the will. Neither general bad treatment nor general kindness is evidence of undue influence, unless shown to be part of a crafty arrangement to procure the will. *Tawney vs. Long*, 76 Pa., 106.

VI. NEGLECT BY UNEQUAL DISTRIBUTION OF PROPERTY.

1. An unequal division by a testatrix among her children is not evidence of undue influence. Yet there is a limit, beyond which it will cease to be a question of harsh judgment, and then the repulsion which a parent exhibits to her child must be held to proceed from some mental defect. *Murray's Estate*, 11 Pa. County, 263. *Carter's Estate, Idem*, 143. 2. Where a will makes equal gifts to testator's children, and the terms are altered by a codicil, nothing but plain words showing a contrary intention will overcome the presumption of equality. *Budd's Estate*, 2 Pa. Dist., 148. 3. Harsh discrimination against a child, although insufficient in itself to avoid a will, is unnatural, and is an important circumstance, in connection with other evidence, in determining testamentary capacity. *Carter's Estate*, 1 Pa. Dist., 69. *Lein's Estate, Idem*, 423. 4. A testator has the right to do as he deems best with his own property ; to prefer one child to another, or disinherit one or more at his discretion. *Loeser's Estate*, 167 Pa., 498.

VII. NEGLECT IN BEQUESTS TO CHARITY. 1. In the case of a charitable bequest, it is immaterial how vague, indefinite and uncertain the objects of the testator's bounty may be, provided there is a discretionary power in some one over its application to those objects. *Domestic Missionary Society's Appeal*, 30 Pa., 435. 2. Under the act of April 26, 1855, a bequest to a charity is void, unless the will containing it be made within one calendar month before the decease of the testator. An order in the will to sell real estate, however, for that purpose, effects a conversion of the land into personalty. A bequest to a church, to be expended in masses for the repose of the

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testator's soul, is a religious use. *Evans' Appeal*, 63 Pa., 183. *Rhymer's Appeal*, 93 Pa., 142. *Miller vs. Porter*, 53 Pa., 202.

VIII. NEGLECT IN CAVEAT. A *caveat* is a kind of entry left in a book in the register's office to stop the granting of probate and letters, without notice to the *caveator*. The proper practice is for him subsequently to file an affidavit disclosing his grounds of objection. *Titlow's Will*, Leg. Gaz. Report, 97.

IX. NEGLECT IN CONSTRUING. 1. Words will not be taken in their literal sense, when they would defeat the manifest purpose of the testator. *Adams' Estate*, 16 W. N., 222. 2. The intention of a testator must be deduced from the language of the will taken as a whole. Later clauses of a will must prevail over former ones in the distribution of the estate. *Bender's Estate*, 10 Lancaster Review, 157. *German vs. German*, 27 Pa., 116. 3. It is a well-settled rule, that a will must so be construed as to avoid a partial intestacy unless the contrary be unavoidable. *Board of Mission's Appeal*, 91 Pa., 512. 4. The intention of a testator is to be collected, not from any particular or detached clause of the will, but from the whole taken together. *Butz vs. Butz*, 2 Pennypacker, 270. 5. When the meaning of a will is doubtful, that construction is preferred which leads to equality of distribution among the children of the testator. The language should not be taken in so literal a sense as to defeat a purpose manifest on the face of the will. *Bradley's Estate*, 17 Phila., 474. *Adams' Estate, Idem*, 481. 6. In construing the will of a testator, his intention is to be carried out if lawful, and all technical rules are to be disregarded. Whenever the meaning of a devise is uncertain, the law will adhere as closely as possible to the general rules of inheritance. *Chandler vs. Woelpper*, 23 W. N., 469. *Park's Estate*, 4 Pa. County, 560. 7. In construing a will, all the surrounding circumstances of the testator, as well as the technical expressions in the will, will be considered by the court, in order to carry out the testator's intention. *Carter's Estate*,

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1 Delaware Co., 257. 8. A will is to be construed in the light of the circumstances surrounding the testator at the time of its execution ; and the construction is to be upon the entire instrument. An interpretation which leads to intestacy or which defeats a manifest purpose of the testator, will not be adopted, if any other is possible ; and to accomplish such purpose, words may be freely transposed, omitted or supplied. *Duffy's Estate*, 36 W. N., 199. *Carlile's Estate*, 34 W. N., 62. *Carroll vs. Barns*, 108 Pa., 386. 9. When the intention of a testator can be clearly ascertained from the whole, it is always the law of the case, unless such intention conflicts with certain general rules limiting the extent of testamentary power. In construing a will, the court should call to its aid the circumstances under which the will was made, the state of the testator's property, his family, and the like. *Earp's Will*, 1 Parsons, 453. 10. The heir at law is not to be disinherited by anything less than a clearly apparent intention to pass the estate to another line of succession. *Faulstich's Estate*, 154 Pa., 188. 11. If the construction of a will be doubtful, the construction is to be as conformably as possible to the general rules of inheritance. *France's Estate*, 75 Pa., 221. 12. In construing a will, we need not consider the words exactly in the order in which they are placed, if a different arrangement will better answer the apparent intent of the testator. If a particular intent in the will is inconsistent with the general intent, the former must give way to the latter. *Ferry's Appeal*, 102 Pa., 207. *Finney's Appeal*, 113 Pa., 11. *McDevitt's Appeal*, *Idem*, 103. 13. Where a clause in a will is obscure or ambiguous, words which manifest an intention on the part of the testator to dispose of his whole estate, are to be treated as favoring the construction that he meant to pass a fee. *Geyer vs. Wentzel*, 68 Pa., 84. *Huber's Appeal*, 80 Pa., 357. 14. The intention of a testator is the guide to a proper understanding of his will. It is not so much the meaning of the words used, as what he meant by the use of those words. *Hicks' Estate*, 25 W. N., 499. *Hancock's Appeal*, 112 Pa., 532. *Weidman's Appeal*, 2

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Walker, 389. 15. The policy of the law is to favor that construction of a will, which makes an estate vest absolutely at the earliest possible period. *Hershberg's Estate*, 9 Lancaster Review, 121. 16. It is an established rule in the construction of wills, that, where it is evident the testator has not expressed himself as he intended and supposed he had done, and the effect is produced by the omission of some words, which certainly have been omitted, they may be supplied by intendment, and the will construed as if these words had been written where they were intended. The cardinal rule for the construction of wills is, that the intent of the testator must be gathered from the will itself. *Hellerman's Appeal*, 115 Pa., 120. *Baker's Appeal*, 115 Pa., 590. 17. It is an unquestioned rule, that the intention of the testator shall govern in the construction of every devise, wherever that intention is clearly manifested, and is not inconsistent with the established principles of law. The intention should be gathered from the whole instrument, and the construction given should be consistent with the whole scheme of the will. If a general intent and a particular intent are inconsistent with each other, the latter must yield to the former. *Middleswarth vs. Blackmore*, 74 Pa., 418. 18. If the intention in a will be not clear and plain, the words shall receive their most natural construction. *McDaniel's Estate*, 18 Phila., 202. 19. In the interpretation of a will, all the parts thereof are to be construed in relation to each other, so, if possible, as to form one consistent whole, from which the intent of the testator can be taken. *Miller's Appeal*, 113 Pa., 459. 20. Where it appears from the entire language of a will that the testator's real intention would be rendered clearer by transposing the order of the bequests, the court will construe the will as though the testator had written them in the transposed order. *Merkel's Appeal*, 109 Pa., 235. 21. There are no arbitrary or unbending rules in the construction of the words of a will. No two wills are in all respects alike. The rule is, that the intention of the testator of each will separately

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is to be gathered from its own four corners. *Provenchere's Appeal*, 67 Pa., 466. 22. All mere technical rules of construction must give way to the plainly-expressed intention of a testator, if that intention is lawful. We should not attempt to construe that which needs no construction. *Reck's Appeal*, 78 Pa., 435. 23. Technical rules of construction shall not prevail against the evident intention of the testator. It is no objection to the interpretation of a will, that such interpretation may result in an absurdity where the intention of the testator is clear. *Root's Estate*, 8 Lancaster Review, 153. *Knauss' Estate, Idem*, 269. *Harris' Estate*, 74 Pa., 452. 24. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense is shown. When a testator uses technical words, he is presumed to employ them in their legal sense. *Schaeffer vs. Messersmith*, 10 Pa. County, 366. 25. The parts of a will are to be reconciled when they can be, and one clause permitted to displace another only in case of invincible repugnancy. All writings are to be construed as wholes ; parts should interpret and modify other parts. *Shreiner's Appeal*, 53 Pa., 106. 26. No words in a will are to be rejected, if any meaning can be assigned to them ; they must be so construed as to carry out the testator's intention, if it can be done consistently with the rules of law ; if not, those rules override the intention. *Seibert vs. Wise*, 70 Pa., 147. 27. The general intent of a will being ascertained, a particular inconsistent intent will be overlooked. Every sentence and word in a will must be considered in forming a judicial opinion upon it. *Schott's Estate*, 78 Pa., 40. 28. A restricted meaning cannot be given to a will, where the effect would lead to an intestacy. *Stiver's Estate*, 21 W. N., 335. 29. The main intent of the testator should govern, and if possible all parts of his will be made to harmonize with it. It is only when clauses in a will are wholly irreconcilable, that any one can be rejected. Mr. Jarman, in his treatise on wills, asserts, that where two clauses or gifts are irreconcilable, so

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that they cannot stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being deemed to denote a subsequent intention. *Horwitz vs. Norris*, 60 Pa., 287. *Stickle's Appeal*, 29 Pa., 234. *Hiestans vs. Meyer*, 6 York Record, 55. *Van Steuben's Estate, Idem*, 96. *Shaltar vs. Ladd*, 8 Pa. County, 528. *Snively vs. Stover*, 78 Pa., 484. *Newbolt vs. Boone*, 52 Pa., 167. 30. While there is no doubt that of two contradictory clauses in a will, the former must give way and the latter take effect, yet the two clauses must refer to the same subject-matter, and the latter must be clearly inconsistent with the former. The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. *Sheetz's Appeal*, 82 Pa., 213. 31. There is no more difficult task than to arrive at the meaning of a testator, when he has used technical words, but evidently not in their proper sense. In construing a will, in cases of doubt, the grammatical collocation of words should be adhered to, unless there be clear reasons requiring a different construction. *Shirey vs. Postlewaite*, 72 Pa., 39. 32. Where a will is artistically drawn, and evinces an accurate use of technical terms, the presumption that the testator used them in their legal sense, is greater than if the will indicates that it was drawn by an illiterate man. The intention of the testator is the prevailing consideration in applying all rules of construction. This is to be judged of exclusively by the words of the instrument, as applied to the subject-matter and the surrounding circumstances. Parol evidence to show such intention, such as his declarations of what he had done or meant to do is inadmissible, but it is competent to determine which of several persons or things was intended under an equivocal description. In construing the autograph will of an illiterate man, the meaning of technical words may be disregarded. *Porter's Appeal*, 94 Pa., 332. 33. In the construction of a will, the intention of the testator must govern, and to this intention, when discovered, technical language, and

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even the ordinary meaning of words, must give way. *Thompson's Appeal*, 100 Pa., 481. 34. In the interpretation of wills, the presumption is in favor of the proper and correct use of words, whether technical or belonging to the language of ordinary life. Illiteracy raises no presumption that words are used incorrectly. *Ihrle's Estate*, 162 Pa., 369. 35. Where the construction of a will is doubtful, that construction is to be preferred which conforms to the general rule of inheritance. Where two clauses in a will are inconsistent, the latter one must prevail. *Von Steuben's Estate*, 3 Northampton Co., 293. 36. Technical rules of construction must give way to the plainly expressed intention of a testator; and when, in aid of a written instrument, its intention can be gathered from undoubted proofs, the equities of parties are not to be overthrown by a rigid adherence to one alternative meaning of an equivocal technical word. *Wright's Appeal*, 89 Pa., 67. *Skerrett vs. Moore*, 4 Delaware Co., 507. *Ivins' Appeal*, 106 Pa., 176. *Doebler's Appeal*, 63 Pa., 9. 37. There can be no extrinsic testimony to show an intention to devise in a particular way what is not devised at all. *Worley's Estate*, 7 York Record, 198.

X. NEGLECT IN CONTESTING. 1. Unless the probate of a will devising real estate is contested within five years and as directed by the act of April 22, 1856, it becomes conclusive upon all persons, whether infants, *femes covert* or *non compos mentis* or not. The probate of a will is a judicial act which cannot be impeached collaterally, but must be contested by *caveat* and action at law duly pursued. *Cochran vs. Young*, 104 Pa., 333. *Broe vs. Boyle*, 108 Pa., 81. *Folmar's Appeal*, 68 Pa., 485. *Kenyon vs. Stewart*, 44 Pa., 189. *McCort's Appeal*, 98 Pa., 33. 13 Lancaster Bar, 9. *Warfield vs. Fox*, 53 Pa., 382. 2. A contest to set aside a will should not only be supported by sufficient evidence, but also prosecuted with diligence, especially where the contestant is the commonwealth, claiming the estate by virtue of escheat. *Cardwell's Estate*, 20 Phila., 149. 28 W. N., 291. 3. Where a legatee

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under a will had actual knowledge of proceedings to set it aside, he cannot come in afterwards on the ground that notice has not been given him. *Johnson's Appeal*, 4 W. N., 80. 4. A will may be contested in whole or in part, and may be void in part and otherwise valid. *Rudy vs. Ulrich*, 69 Pa., 177. 5. The act of April 22, 1856, in express terms makes the probate of a will devising real estate conclusive as to such realty, not at the end of five years, but unless some one interested shall within five years contest its validity. The probate is only conclusive after the termination of five years. *Wilson vs. Gaston*, 92 Pa., 214.

XI. NEGLECT IN DATE OF EXECUTION. A legacy to a religious society is a charitable use under the act of April 26, 1855, and is void where the will was executed at least one calendar month before the testator's death. *McLean vs. Wade*, 41 Pa., 266.

XII. NEGLECT IN DEVISING. Where a testator was somewhat weak in mind, and the person whose advice had been sought and taken receives a large benefit under the alleged will, it must be shown affirmatively that the testator had full understanding of the nature of the disposition. *Cuthbertson's Appeal*, 97 Pa., 163.

XIII. NEGLECT IN FILLING UP BLANKS. A will was witnessed, and a blank was left for the name of the residuary legatee. This was afterwards filled up, but as the subscribing witnesses were not present when this addition was made, held, that as to the residuary devise, the will was not properly proved. *Derr vs. Greenawalt*, 22 *Pittsburg Journal*, 13.

XIV. NEGLECT IN INTERPRETING. 1. It is no objection to the interpretation of a will, that such interpretation may result in an absurdity, where the intention of the testator is clear. *Knauss' Estate*, 9 Pa. County, 621. 2. The general rule of interpretation of wills requires us to be liberal in favor of the heirs at law, and strict against devisees. *Musselman's Estate*, 39 Pa., 469.

XV. NEGLECT IN THE LANGUAGE. 1. The general rule

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it, that parol evidence is admissible only to explain latent ambiguities, or to apply provisions of a will to the subject or person intended, where the description is defective, uncertain or too general to be understood specifically. *Best vs. Hammond*, 55 Pa., 409. 2. An instrument of writing, in order to operate as a will, must be ambulatory and revocable in its nature; if upon delivery interests vest, though to be enjoyed in possession in the future, or obligations are created enforceable by the parties, such instrument is a contract *inter vivos* and not a will. *Book vs. Book*, 104 Pa., 240. 3. Where the intendment of the will is doubtful, the law leans in favor of an absolute estate; of the primary rather than the secondary intent. *Fitzwater's Appeal*, 94 Pa., 146. 4. It often happens that an unskillful scrivener who uses technical words and legal phrases, creates more difficulty than would the unlearned testator himself, had he employed his own simple language to express his meaning. *Fetrow's Estate*, 58 Pa., 426. 5. When the omission or insertion of words has left unexpressed or wrongly expressed what, from the whole tenor of the will, was the intention of the testator, the court will permit the will to be read, as if the words had been inserted or omitted. This is done only when the intention is clear beyond a reasonable doubt. *McKeehan vs. Wilson*, 53 Pa., 74. 6. It is well settled, that if the language of the will admit of being restricted to property belonging to or disposable by the testator, the inference will be that he did not intend the words to apply to that over which he had no disposing power. *Miller vs. Springer*, 70 Pa., 273. 7. No formal words are necessary in order to make a valid will; the form of the instrument is immaterial, if its substance is testamentary. A gift or bequest after death is of the very essence of a will. Whether a writing is a will or not, does not depend upon the maker's declaring it to be a will at the time he executes it, but upon its contents. *Patterson vs. English*, 71 Pa., 458. 8. The grammatical construction of language is always entitled to weight in interpreting a will, but when the testator was not familiar with grammatical rules, the force of

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such construction is materially diminished. *Raudenbach's Appeal*, 87 Pa., 51. 9. Parol evidence is not admissible to supply any omission or defect in a will which may have occurred through mistake or inadvertence. Such evidence cannot be adduced, either to contradict, vary, add to or subtract from the contents of a will. *Wallize vs. Wallize*, 55 Pa., 249. 10. It is not every uncertainty or ambiguity apparent on the face of an instrument, which will justify the introduction of parol testimony to explain it. It is only in those cases where ambiguity avoids the instrument. Courts of law have always leaned against extrinsic evidence to explain the intention of the testator; and in such cases parol evidence is admitted from necessity. *Wusthoff vs. Dracourt*, 3 W., 243. 11. Where a legacy is bequeathed to a society which does not exist at the date of the will or the death of the testator, the residuary legatees and not the next of kin are entitled to the amount of such legacy. *Woolmer's Estate*, 3 Wh., 477. 12. Transpositions, insertions of implied words, and different punctuations of a will, are permissible when warranted by the context and general scheme of distribution. *Walker vs. Atmore*, 30 W. N., 515.

XVI. NEGLECT IN MAKING. 1. Making a will on Sunday is not within the prohibition of the act of April 22, 1794. It is no desecration of the Sabbath. *Beitenman's Appeal*, 55 Pa., 183. 2. A nuncupative will cannot be received for probate unless made *in extremis*. *Conaughton's Will*, 1 Pa. Dist., 309. 3. A double will, consisting of one document, made by husband and wife, making reciprocal provisions for each other, and executed by both, will be sustained. The will so made must be regarded as the separate will of each testator, as fully as though the will of each had been separately drawn and signed. Where there is no joint property or joint devise, it is not a joint will. It is not a contract between the parties. It is therefore revocable by either or both. *Cawley's Estate*, 136 Pa., 628. 4. Where a will was drawn in the form of a bond, payable after the testator's or obligor's death, and delivered

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to the party to be benefited thereby, it was held by an equally divided court to be a valid testament, proof of the signature being made by two witnesses, who were not subscribing witnesses. *Frew vs. Clark*, 3 W. N., 497. 5. Where a will is written on several sheets of paper fastened together, proof by two witnesses of the signature of the testator at the end thereof suffices. The jury may decide, whether there has been any fraudulent addition to the instrument. It would conduce to safety, if the testator were to write his name on each sheet of the document. *Ginder vs. Farnum*, 10 Pa., 98. 6. Under the act of April 8, 1833, the will of a woman is revoked by her subsequent marriage. Where, however, in contemplation of marriage, a woman executes a will with the consent of her future husband, making therein a liberal provision for him, it may be taken in equity as an ante-nuptial settlement, and the husband is estopped from interposing an objection to its full enforcement. *Lant's Appeal*, 95 Pa., 279. 7. A paper which was intended to operate as a will, and which is wholly invalid as such, cannot be turned into a declaration of trust, so as to operate as a will. *Long's Appeal*, 86 Pa., 196. 8. It is not necessary that an instrument should be of testamentary form, in order to operate as a will. A check on a bank, together with the memorandum on the margin, showing that it was to be operative only on the death of the drawer, may, if duly signed and proved, be admitted to probate as a will. *Lombaert's Estate*, 20 Phila., 129. 9. A last will, to be valid, need not be in testamentary form. Signed checks fastened to the stub of a check-book, on which stub is explanatory writing, unsigned, have been admitted to probate as a codicil. Any instrument which is revocable, and whose disposition of property is to take effect after the death of the maker, is a testament. A paper, signed by the decedent at the end thereof, intended to take effect at his death, and making an intelligent disposition of his property, contains all the requisites of a valid will. The fact that it speaks in the past tense, does not affect its validity. *Lombaert's Estate*, 28 W. N., 67. *Fouche's Estate*, *Idem*,

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542. *Pritchett's Estate, Idem*, 167. 10. A mere personal letter addressed to a legatee or to counsel, and found among the papers of the decedent after her death, cannot be treated either as a will or codicil. *Magoohan's Appeal*, 35 *Pittsburg Journal*, 389. *Scott's Estate*, 38 *Idem*, 305. 11. To constitute a valid will of personalty, the writing must be either complete on its face, or if incomplete and defective, it must appear that it was intended by the writer to operate as his last will in its unfinished state. In the present case, disconnected items written with a lead pencil in the back pages of a memorandum book, the last item being signed by the decedent were held not to constitute a last will. *Patterson vs. English*, 4 *Legal Opinion*, 429. 12. In this case, a decedent, in his last illness, sent a letter of instructions to his attorney to prepare a will in accordance therewith. He signed this letter, and told witnesses that it was his will. It was admitted to probate. *Scott's Estate*, 147 *Pa.*, 89. 13. A soldier at home on furlough cannot make a valid nuncupative will, as he can do as to his personal property when in actual military service. *Smith's Will*, 2 *Pittsburg*, 548. 14. The constraint which will avoid a will must be one operating in the act of making a will; undue influence long past and not connected with the testamentary act is not evidence to impeach a will. *Wainwright's Appeal*, 89 *Pa.*, 220. 15. The form of the testament is immaterial, if its substance is testamentary. The disposition must be one that is to take effect after death. The document passes no present interest, and need contain no promise to pay. *Wilson vs. Van Leer*, 103 *Pa.*, 600.

XVII. NEGLECT IN THE NAME OF A LEGATEE. A mistake by the testator in the name of a legatee, will be corrected by the court where a description is also given in the will, and the context furnishes the means of making it. *Packer's Estate*, 15 *W. N.*, 486. *Rohrman's Estate*, 10 *Lancaster Bar*, 2.

XVIII. NEGLECT IN PLEADINGS. In a feigned issue on a will, the pleadings should present a distinct question of fact; "whether the writing is the will of the decedent" is too loose.

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In an issue directed by the register, the court has jurisdiction to try issues of fact only. A will which outrages common feeling and shows want of ordinary natural affection, is to be considered in connection with other evidence on the question of sanity. *Bitner vs. Bitner*, 65 Pa., 347.

XIX. NEGLECT IN SEPARATING THE PAGES. A will may be written on several pieces of paper, and they need not be physically united. *Fosselman vs. Elder*, 1 Pennypacker, 87. *Ginder vs. Farnum*, 10 Pa., 98.

XX. NEGLECT OF WITNESSES. 1. Where a subscribing witness to a will did not see the testator sign, nor acknowledge the paper to be his last will, nor was requested by the alleged testator to witness the document, his signature is valueless. *Barr vs. Graybill*, 13 Pa., 399. 2. The "wills act" does not require that the witnesses to a will should be subscribing witnesses. Circumstances may supply the want of one witness, when they go directly to the immediate act of disposition. *Carson's Appeal*, 59 Pa., 493. 3. Under the married woman's act of April 11, 1848, the will of a married woman must be executed in the presence of two competent witnesses, otherwise her estate will pass to her heirs. One interested under a will at its execution, is not competent to give corroborative evidence of its execution. *Camp vs. Stark*, 81x Pa., 235. 4. Proof of execution of a will must be by two witnesses, each of whom must separately depose to all the facts necessary to complete the chain of evidence. *Derr vs. Greenwalt*, 76 Pa., 239. 5. The provision of the act of 1848, that a husband shall not be a subscribing witness to his wife's will, is a provision for the proof of the instrument, not a prohibition against his presence at the execution. *Dickinson vs. Dickinson*, 61 Pa., 401. 6. The signature of a subscribing witness to an ordinary instrument of writing, implies nothing more than the paper was signed by the person whose act or deed it purports to be. It is not so in the case of a subscribing witness to a will. His attestation includes the further fact that the testator was of sound mind when he executed it.

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The witness is there to see that no fraud may be practiced upon the testator in the execution of the will, and to judge of his capacity. The declarations of a deceased subscribing witness to a will may be given in evidence to invalidate it. *Egbert vs. Egbert*, 78 Pa., 328. 7. It is not uncommon in practice to corroborate the defective memory of a witness by proof of what was his habit in similar circumstances. Thus a subscribing witness to a will, if he be unable to recollect whether he saw the testator sign, or heard it acknowledged, is permitted to testify to his own habit never to sign as a witness, without seeing the party sign or hearing him acknowledge his signature. *Eureka Ins. Co. vs. Robinson*, 56 Pa., 265. 8. Proof of the handwriting of a subscribing witness to a will, where the witness cannot be called, is equivalent to his oath to the signature of the testator. *Hays vs. Harden*, 6 Pa., 409. *Gibbon vs. Green*, 5 Lancaster Bar, No. 32. 9. It is not requisite that a will should be subscribed by the witnesses, except where bequests to charities. *Hight vs. Wilson*, 1 D., 94. 10. Where a subscribing witness said that he did not recollect the assertions of the testator at the time of signing, held, that this negative testimony could not overcome the positive grounds arising from the probate. Want of memory will no more destroy the attestation than insanity or death. *Kirk vs. Carr*, 54 Pa., 285. 11. Proof of attestation proves a will, although the witnesses may have forgotten all about the circumstances. Proof of handwriting, if the witnesses be dead, out of the country, insane, infamous or interested, is sufficient. *Leckey vs. Cunningham*, 56 Pa., 373. 12. It is not necessary that the subscribing witnesses to a will should see the testator make his signature, nor even that a will should be read to a blind testator in their presence. *Mealey's Will*, 24 Pittsburg Journal, 83. 13. A charitable bequest cannot be sustained, unless the will is attested by two disinterested witnesses, as required by the act of April 26, 1856. *Morris' Estate*, 8 Montgomery Co., 153. 14. Want of memory on the part of a witness to the signature to a will,

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as to what was said and done when it was executed by the testator and subscribed by him and another witness, will not invalidate his act, if he recognized his own signature. *McKee vs. White*, 50 Pa., 360. 15. The subscribing witnesses to a will are not always the best to prove the sanity of the testator. *McTaggart vs. Thompson*, 14 Pa., 149. 16. A will signed by the testator is not rendered incomplete because it contains an attestation clause unsigned. *Mellert's Appeal*, 13 W. N., 222. 17. A person named in a will as executor, but having no beneficial interest in it, is a competent witness to its execution. The incompetency of legatees to attest a will, disposing of land in England, was declared by the statute of frauds. *Snyder vs. Bull*, 17 Pa., 54. 18. Proof as to the genuineness of a mark to a will by a witness, who was not present when it was made, but who judged it was genuine from its resemblance to other marks made by the testatrix to other instruments, is not competent proof. *Shinkle vs. Crock*, 17 Pa., 159. 19. A married woman's will is properly executed if the witnesses are present when she signs it, and either see her do so or receive acknowledgement of her signature to it. *Whiteside's Estate*, 18 Phila., 234.

XXI. NEGLECT IN THE WRITING. 1. A nuncupative will is only valid when made in the extremity of the testator's last sickness, which has come upon him so suddenly and violently as to prevent him from putting his testamentary wishes in writing. Such will must be made in his dwelling or where he has resided for at least ten days next before the making of such will, except where such person shall be surprised elsewhere by sickness and shall die before returning home. Nuncupative wills affect personal estate only, and are barely tolerated by the law. *Conaughton's Estate*, 30 W. N., 202. 2. A will written and signed with lead pencil is in writing within the meaning of the act of April 8, 1833, and is a valid will. Blackstone asserts a deed must be written or printed on paper or parchment; for if it be written on stone, board, linen, leather, or the like, it is no deed. It is not essential that a

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writing be in ink ; it may be in pencil. The same rule applies to promissory notes or book accounts. No prudent scrivener will write a will in pencil, except under extreme circumstances. Any appearance of alteration should be carefully scrutinized. *Myers vs. Vanderbilt*, 84 Pa., 513. 25 **Pittsburg Journal**, 107. 3. As respects the validity of a will, writing and signature with a lead pencil are the full equivalent for a writing in ink. The instrument has precisely the same legal effect in either case, all legal distinction between the two kinds of writing being obliterated in this state. *Tomlinson's Estate*, 133 Pa., 245. 6 **Montgomery Co.**, 53. 4. Whether valid or not, no will should be written or signed with a lead pencil, on account of the facility with which the writing may be altered or effaced. *Patterson vs. English*, 20 **Pittsburg Journal**, 33. 71 Pa., 484. 5. A writing on a slate, intended by the decedent to be her last will and testament, is not admissible as such under our statute of wills. Ordinary writing with material in common use is requisite. A writing on a rock, a wall or a tree, is excluded, for it is incapable of the use and treatment prescribed. No writing effected with material not designed for or suited to the purpose, is within the statute. The common judgment is against the fitness of lead pencil and slate for writing of a permanent character. Under a statute similar to ours, the English ecclesiastical courts have, however, admitted lead pencil wills to probate. Whether we will follow this lead is yet to be shown. The danger from admitting such wills is greater here than in England, where the statute requires subscribing witnesses. *Reed vs. Woodward*, 11 Phila., 541. 6 **Lancaster Bar**, No. 2. 2 **Chester Co.**, 563. 6. A letter signed by the writer and addressed to his counsel requesting him to prepare a will in accordance with the directions contained in it, standing by itself cannot take effect as a will. *Scott's Estate*, 8 **Lancaster Review**, 157.

XXII. NEGLECT OF CLEAR INTENT. To prevent a will from failing of effect altogether, a devise or bequest will be implied, if there be anything to designate the person to take.

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Graham vs. Graham, 3 Clark, 213. *Rochell vs. Edinger*, 1 W. N., 304.

XXIII. NEGLECT OF COURTS IN SETTING ASIDE. The growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged. It rarely happens, that a man bequeaths his estate to the entire satisfaction of either his family, or friends. The very object of a will is to produce inequality and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who have been affectionate, and to punish those who have been disobedient. *Cauffman vs. Long*, 82 Pa., 77.

XXIV. NEGLECT OF EXECUTOR TO DEFEND. An executor is not bound to sustain the will of his testator out of the estate, but if he undertakes to do so, it must be as the agent and with the authority of those claiming under the will. *Neal's Estate*, 18 Phila., 52.

XXV. NEGLECT OF JUDGMENT IN MAKING. 1. Undue influence operating on the mind of an elderly woman weakened by intemperance, and subject to the persuasions of one for whom she manifested sensual desire, is an imprisonment of the mind not less cogent than actual duress. *Dushane's Appeal*, 4 W. N., 78. 2. A testator, mentally capable, and free from undue influence, may disregard his wife and children, and make any eccentric or ridiculous disposition of his property which does not violate a rule of law. A trust for visionary and impracticable objects will be sustained, where discretion is given to the trustees to terminate it when it can no longer be substantially executed. But a will which may be inferred to be the offspring of an insane delusion is invalid, though in other respects the mind of the testator was unimpaired. *Carter's Estate*, 1 Pa. Dist., 69. *Lewis' Estate, Idem*, 423.

XXVI. NEGLECT OF MENTAL CAPACITY. 1. Where the party charged with exercising undue influence derives little or no benefit from the will, there must be evidence of such direct

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influence used at its making as to destroy the free agency of the testator. Where the party charged is a stranger (in the present case a scrivener) and derives considerable benefit, such direct proof is not required. This is particularly so, where the party benefited stands in a confidential relation to the testator. *Boyd vs. Boyd*, 66 Pa., 283. 2. Where a testator is shown to be of weak mind, though it be not sufficient in itself to wholly destroy testamentary capacity, and the person by whom or under whose advice the will has been written, being a stranger to the testator's blood, receives a large legacy or bequest, the burden shifts from the contestants to the proponents of the will to prove affirmatively both testamentary capacity, and that the testator acted with a full knowledge of the value of his estate. *Caldwell vs. Anderson*, 104 Pa., 199. *Linton's Appeal*, *Idem*, 228. 3. Where witnesses have testified to the changed conduct of the testator to his family, his loss of memory, his inability to read or to understand what was read to him, or to converse coherently, they may be permitted to express an opinion as to his testamentary capacity. *Good vs. Good*, 1 Monaghan, 718. 4. It is necessary that a testator, when making his will, should recollect and understand the nature of the business in which he is engaged, the property he means to dispose of, the persons who are the objects of his bounty, and the manner in which it is to be distributed among them. *Horbach vs. Denniston*, 3 Pittsburg, 49. *Tenbrook vs. Lee*, 5 Clark, 37. 5. The mere existence of habits, resulting from physical causes, and the indulgence of eccentricities arising out of a contempt for the conventionalities of society, are not inconsistent with the possession of a sound and disposing mind. *Probst's Will*, 2 Lancaster Review, 97. 2 Delaware Co., 278. 6. Partial unsoundness, not affecting the general faculties, and not operating on the mind of the testator in regard to testamentary disposition, is not sufficient to make a person incapable of making a will. *Pidcock vs. Porter*, 68 Pa., 342. 7. Physical pain, restlessness and despondency do not incapacitate a testator from making a

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will. *Spellier's Estate*, 2 Pa. Dist., 513. 8. Old age, failure of memory or habitual drunkenness, will not *per se* constitute incapacity to make a will. The test of capacity is, that the testator's mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed his will. Weakness alone will not invalidate a will. Undue influence may be either through threats or fraud, and must destroy the free agency of the testator at the time when the instrument is made. As a general proposition, less incapacity is sufficient to make a valid will than to transact ordinary business. *Thompson vs. Kyner*, 65 Pa., 368. 9. A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, of the property he possesses, of the disposition he purposes making of it and of the persons and objects he desires to be the recipients of his bounty. *Wilson vs. Mitchell*, 101 Pa., 495.

XXVII. NEGLECT OF SCRIVENER. Parol evidence is not admissible to show that a scrivener, in drawing a will, inserted words, of the meaning of which he was ignorant; although it may be received to explain a latent ambiguity, or rebut a resulting trust, or in case of fraud or mistake, to annul the will. *Iddings vs. Iddings*, 7 S. & R., 111.

XXVIII. NEGLECT OF VALIDITY. A testamentary paper, which by its terms is to be effective on the happening of a certain contingency, cannot be admitted to probate as a will, unless the contingency has occurred. *Morrow's Appeal*, 116 Pa., 440.

XXIX. NEGLECT TO ACKNOWLEDGE. A will was admitted to probate, notwithstanding the subscribing witness swore that the testator, who was in a very feeble condition at the time, signed the will without remark, and made no acknowledgment afterwards. *McLean's Estate*, 2 W. N., 338.

XXX. NEGLECT TO ADMIT TO PROBATE. The decision of a register of wills refusing to admit a will to probate, is a judicial act, and cannot be attacked collaterally. The only

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remedy is by appeal to the orphans' court. The register's decision is entitled to all the weight to be attached to the findings of an auditing judge, or the verdict of a jury, and will not be reversed, unless clear error be shown. *Smart's Will*, 18 Phila., 162.

XXXI. NEGLECT TO AFFIX STAMP. A will is not invalid, because no United States revenue stamp was placed upon it when executed. The register should affix the stamp before he issues letters testamentary. *Werstler vs. Custer*, 46 Pa., 502.

XXXII. NEGLECT TO AUTHENTICATE. A nuncupative will cannot be established, where neither the words nor their substance, as used by the alleged testator, were committed to writing by any one, and no proof was made of a request by the testator to bystanders to bear witness that the words used were his will. *Taylor's Appeal*, 47 Pa., 31.

XXXIII. NEGLECT TO ELECT TO TAKE AGAINST. 1. A widow is not bound to make an election, until all the circumstances and the state, condition and value of the fund are known. The fact that the wife was present at the execution of her husband's will, and made fully acquainted with its contents, and wrote at the time on a separate paper that she accepted its provisions in lieu of dower, would not bind her by such election made during coverture. *Kreiser's Appeal*, 69 Pa., 194. 2. Where a husband or wife decides to take against the will of the other, the election to do so should be filed promptly, and no act in connection with the estate should be performed by such survivor, which seem to indicate a contrary election. *Scholl's Appeal*, 1 Monaghan, 572.

XXXIV. NEGLECT TO GRANT ISSUE. 1. Upon an appeal from the register admitting a will to probate, the orphans' court will not grant an issue to be tried by a jury, unless testimony is furnished by the appellant sufficient in itself to sustain a verdict against the will. *Corson's Estate*, 3 Montgomery Co., 103. *Hardy's Estate*, 12 Phila., 22. *Colgate's Estate*, 5 W. N., 170. 2. Neither the register nor the court is bound to award an issue when demanded, as to the validity and due execution

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of a will. A mere naked allegation without evidence or against evidence, cannot create a dispute requiring an issue. If the facts are material, the court is bound to award an issue when requested. *Cozzens' Will*, 61 Pa., 196. 3. The exercise of the discretionary power of the register to grant an issue *devisavit vel non*, may be corrected by the orphans' court for abuse, but not otherwise. *Elliott's Will*, 41 Pittsburg Journal, 474. 4. To warrant the granting of an issue *devisavit vel non*, there must be evidence sufficient to sustain a verdict against the will. Fraud, restraint, or other undue influence must be shown to have been a present operating power at the very time of making the instrument. *Humphries' Estate*, 6 Pa. County, 439. 5. It is a well-settled rule that, unless the testimony as to testator's mental incapacity or undue influence exerted on him be sufficient to sustain a verdict against the will, the parties will not be subjected to the delay, expense and trouble of a trial by the award of an issue. *Loeser's Estate*, 35 W. N., 543. 6. Where the testimony, taken under a petition to the orphans' court for an issue, is such that the court in the exercise of a sound discretion ought not to sustain the verdict of a jury against the validity of the will based upon such testimony, the court should refuse to direct an issue. *Eddley's Appeal*, 109 Pa., 406. *South's Estate*, 2 W. N., 212. *McLean's Estate*, *Idem*, 38. *Foster's Appeal*, 87 Pa., 67. *Weisman's Estate*, 5 Pa. County, 561. 7. If the question of act as to the improper execution of a will be unsupported by sufficient evidence, the court should refuse an issue. *Wainwright's Estate*, 3 W. N., 458.

XXXV. NEGLECT TO NAME DEVISEE. Names of devisees may be supplied where necessary to effectuate the intention of a testator. *Robinson's Estate*, 7 Luzerne Register, 123.

XXXVI. NEGLECT TO PROBATE. A will may be probated, even after the expiration of many years after the death of the testator and of the subscribing witnesses, and even after letters of administration have been granted, an account filed, and distribution made of the estate among the heirs at law.

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If rights have vested under the proceedings of the administrator in selling or distributing the estate, they come up in another form. *Transue vs. Brown*, 31 Pa., 93.

XXXVII. NEGLECT TO PRODUCE. 1. If a will, duly executed, is destroyed after the death of the testator, or without his authority, in his lifetime, it may be established upon satisfactory proof of its having been so destroyed, and of its contents; but the proof upon both points must be of the clearest and most satisfactory character. A lost will not traced out of the possession of the testator, is presumed to have been revoked by him. *Buechle's Estate*, 33 W. N., 393. 2. Where it is shown that a will was in existence, unrevoked, at the testator's death, but was afterwards lost or destroyed, its contents may be proved by parol and the will thus reproduced admitted to probate. *Deaves' Estate*, 140 Pa., 242. *Foster's Appeal*, 87 Pa., 67. 3. The probate of a lost will cannot be permitted, when it appears that the loss was known to the decedent for a long time before his death, and that he had ample opportunity to make a new one, if he had so desired. *Deaves' Estate*, 4 Delaware Co., 254. 4. It was duly proved that decedent had executed a paper which he had declared to be his last will, and that he had not revoked the same; but the will, after decedent's death, could not be found. Held, that a reproduction of it, proved to be a correct copy, should be admitted to probate. *Foster's Will*, 13 Phila., 567. *Prentzel's Estate*, 1 W. N., 222. 5. It is incontrovertible law that when a will is shown to be in possession of a testator, and cannot be found or produced after his death, the legal presumption, in the absence of all proof on the subject, is that it was destroyed by the testator; but this presumption may be rebutted by evidence tending to show a spoliation by others either in the lifetime or after the death of the testator. *Helpenstein vs. Leonard*, 50 Pa., 478. 6. The orphans' court will not attach for failure to obey a citation to produce an alleged will. The petitioner will be remitted to the indictment or action for damages provided by

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the act of March 15, 1832. *McDonald's Estate*, 14 Phila., 253. 12 Lancaster Bar, 20.

XXXVIII. NEGLECT TO PRODUCE WITNESSES. 1. The subscribing witnesses must be called to establish the validity of a will, if living and within the jurisdiction of the court. If they cannot be found after diligent inquiry, other evidence to prove the signature of the testator will be admitted. *Green vs. Green*, 10 Phila., 99. 2. Defect in proof of a will by subscribing witnesses may be supplied. *Smith's Estate*, 3 C. P. Reporter, 212.

XXXIX. NEGLECT TO PROPERLY CANCEL. A will may be cancelled by an act done to the document which displays an intent that it shall have no effect, though the act be not a complete obliteration or physical destruction. Obliteration is not confined to utterly effacing the letters. A line drawn through the writing suffices. Declarations, either verbal or written, are admissible to show the intent. Revocation of a will may be effected by act of writing on the will itself a word which manifests an intent to annul it. Cancellation does not require a signature of any particular form. The instrument is preserved, but with something on it indicative that it has ceased to be operative. A repeal is effected by writing on the will a word manifesting an intention to annul it. *Evans' Appeal*, 58 Pa., 238.

XL. NEGLECT TO PROVE BY SUBSCRIBING WITNESSES. 1. It is not essential that all the subscribing witness should prove the execution of a will. *Hight vs. Wilson*, 1 D., 94. *Fox vs. Evans*, 3 Y., 506. *Rohrer vs. Stehman*, 1 W., 463.

XLI. NEGLECT TO PUBLISH. Publication is required by the law of England, and of many of our states, but it is not the law of Pennsylvania. Nor is attestation by subscribing witnesses requisite. *Fuguet's Will*, 11 Phila., 77.

XLII. NEGLECT TO READ. 1. The declaration by a testator that it is his will implies full knowledge of its contents and it is quite immaterial that the subscribing witnesses were not informed of its contents, or that it was not read in their

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presence. *Hand's Estate*, 18 Phila., 240. 2. Where a will, written in the presence of the testator, and according to his dictation, is executed in accordance with the statutes, it is valid, though not read to or by him. *Hess' Appeal*, 43 Pa., 73.

XLIII. NEGLECT TO RECORD. Where a will had been taken to the office of the register, and the subscribing witnesses had testified to its execution, but it was removed therefrom before being filed or recorded, held, that it was an undue exercise of judicial discretion for a judge to order its recording twenty-four years thereafter. Under the act of March 15, 1832, all wills, after probate, shall remain in the register's office, except when required in court by *certiorari* or otherwise, and if removed for such cause, shall be returned in due course to the office in which they belong. *Guthrie vs. Kerr*, 85 Pa., 303.

XLIV. NEGLECT TO REMEMBER RELATIVES. If the testator design to give his entire estate to a stranger, to the exclusion of his collateral relations, it is not necessary that he should have a recollection of the property he intends to dispose of, or of persons who are thus related to him. Distribution not being the thing attempted, a competency to distribute is not the test of mental capacity. *Stevenson vs. Stevenson*, 33 Pa., 469.

XLV. NEGLECT TO REVOKE. 1. To make a subsequent will revoke a prior will, the former must either expressly revoke the latter, or the two must be incapable of standing together. If a subsequent will be but partially inconsistent with one of earlier date, and contains no express clause of revocation, then that which is later will revoke the prior as to those facts which are inconsistent. *Bradford's Will*, 1 Parsons, 153. 2. Under the act of April 8, 1833, a will executed by a single woman is absolutely revoked by her subsequent marriage, even though her husband has given his written consent, prior to the marriage, to a will by which he is excluded from participation in the estate. *Craft's Estate*, 164 Pa., 520. 3. The act of April 8, 1833, declares that no written will concerning

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real estate shall be repealed, otherwise than by some other written will or codicil, properly executed and proved, or by burning, cancelling or obliterating, or destroying the same by the testator himself, or by some one in his presence, and by his express direction. *Clingan vs. Micheltree*, 31 Pa., 33. *Heise vs. Heise, Idem*, 246. 4. To comply with the statutory requisition of revocation by destroying, there must be some act of destruction, or towards destruction, done *animo revocandi*; mere words will not suffice. If a will be only slightly torn or burned, which reached no portion of the writing, and be unaccompanied with satisfactory evidence, drawn *aliunde*, of the intention to revoke, it will be admitted to probate. No intention to destroy a will in the future, even if the testator honestly and mistakenly believes at the time of his death that he has executed such intention, works a revocation. *Shipler's Appeal*, 3 Pennypacker, 272. *Clingan vs. Micheltree*, 31 Pa., 25. 5. Mere dying declarations, or requests made by a testator, cannot operate as a revocation of his will. The disappointment of the expectations of a testator's children, however grievous, is not sufficient to repeal a will. *Fox vs. Fox*, 88 Pa., 19. 6. When a testator by a codicil revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false and was assumed to be true upon the information of others, the revocation does not take effect, being conditional on a contingency which fails. *Mendinhall's Appeal*, 124 Pa., 397. 7. Where a second will in express terms revokes a former will, but refers to certain bequests therein and re-enacts them, both wills are entitled to probate, but the executor in the former will is not entitled to letters testamentary. *Nelson's Estate*, 147 Pa., 160. 8. Lead pencil lines drawn through a legacy by the testator when the will is written in ink, is a revocation of such legacy. *Tomlinson's Estate*, 6 Montgomery Co., 53.

XLVI. NEGLECT TO SEAL. 1. It is not absolutely necessary that a will, devising real estate in Pennsylvania, should

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be sealed. *Hight vs. Wilson*, 1 D., 94. *Rohrer vs. Stehman*, 1 W., 463. 2. A dash after a testator's signature, even if the will is expressly attested by "hand and seal," is not a seal. An impression on wax was the only seal known to the common law, but we have adopted as a seal a scroll made with ink. *Waln's Estate*, 4 Pa. County, 52.

XLVII. NEGLECT IN SIGNING. 1. A husband and wife made wills in each other's favor, but by mistake each signed the will of the other. The will in such case was an absurdity and could not be corrected after the death of the party. *Alter's Estate*, Legal Gazette Report, 72. 67 Pa., 341. 2. After a will had been signed and witnessed, a clause was added below the signature of the testator, whereby an executor was appointed. This clause was not signed. Held, that the will, without the added clause, was entitled to probate. *Baira's Estate*, 16 Pa. County, 209. 3. Where the testator is *in extremis*, signing by another party in his own name in the presence and by the direction of the testator, is a valid execution of the will. The intention and not the form is the governing consideration. *Baldwin's Estate*, 16 W. N., 300. 4. Where a testator is physically able to affix his own signature to a will, its execution by another at his direction is invalid. If, however, the testator's condition is so feeble that the effort of obtaining his signature would probably be dangerous, he may direct another party to sign for him. *Baldwin's Estate*, 17 Phila., 458. 2 Lancaster Review, 229. 5. The fact that one in his last illness may be able to answer questions "yes" or "no" will not afford a conclusive presumption that he was able to request another person to sign his will for him. *Blocker vs. Hostetter*, 2 Pittsburg Journal, 74. 6. A testator was paralyzed, and said he was unable to write, but would put his mark to the will; he was raised in bed, a pen was put into his hand which was held by another whilst he made his mark. Held, that this was a valid execution of the will, and was the testator's own act with the assistance of another, not the act of another under his authority. *Cozzens' Will*, 61 Pa., 196. 7. Where

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an illiterate person executes a will in favor of a charitable institution by setting his mark thereto, it is unnecessary that the will should be read to him in the presence of subscribing witnesses. Other persons may testify to his knowledge of its contents. *Combs' Appeal*, 105 Pa., 155. 8. Where a testament is formed with the signature obliterated, the presumption is that it was done by the testator. The *onus* to show accident or mistake lies on the party offering it for probate. *Church vs. Robbarts*, 2 Pa., 110. 9. It is essential to the validity of a will, that it be signed by the testator, or by some person in his presence, and by his express direction. If unable to write his name, he must make his mark. If otherwise made by another, while the testator was in a state of stupor, his subsequent ratification will not suffice. *Dunlap vs. Dunlap*, 10 W., 153. *Burford vs. Burford*, 29 Pa., 223. 10. A testatrix executed her will by making a mark ; there were no subscribing witnesses, but the executor testified that he held the pen for her to make the mark. Another witness saw the will lying before the testatrix, who said to her, "This is my will and there is my mark." Held, that the will was sufficiently proved. *Dunn's Estate*, 3 Pa. Dist., 248. 11. A will must be signed by the testator at the end thereof. A will written on three pages, but signed at the bottom of the second page is not properly executed, and should not be admitted to probate. *Frazier's Will*, 1 Lackawanna Jurist, 363. 12. A will must be signed at the end thereof. If signed before, then that which follows is deemed an unexecuted codicil. *Frazier's Will*, 20 Phila., 40. *Smith's Will, Idem*, 94. 7 Lancaster Review, 338. 13. Where a will is written on three pages, and signed at the bottom of the second page, and a disposition of the estate is made on the third page, the will is not properly executed. *Frazier's Estate*, 8 Pa. County, 306. 14. By the act of 1833, every last will to which the testator's name is signed by his direction, or to which he has made his mark or cross, is valid. Two witnesses are necessary to prove this act of the testator. *Greenough vs. Greenough*, 11 Pa., 489. 15. The statute of

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1833 requires every will to be in writing, and unless the party be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and under his direction, and be proved by two competent witnesses. If after the signature of the testator, an unsigned clause be appended, stating reasons for making the devise, the will is thereby rendered invalid. *Hays vs. Harden*, 6 Pa., 409. 16. A will was admitted to probate, which bore only the initials of the testator's name written in ink, the remaining letters of the signature being impressed by the pen, and distinguishable by the aid of a magnifying glass. *Jakob's Will*, 21 W. N., 510. 17. An instrument in writing, testamentary in its character, wholly in the handwriting of a decedent, signed by her at the end thereof by her baptismal name, "Harriet," she being fully identified in the body thereof by a reference to her parents, is entitled to be admitted to probate as her last will. *Knox's Estate*, 6 Lancaster Review, 415. 18. The autograph will of a married woman, living apart from her husband, signed by her first name only and unwitnessed, was allowed to be probated. Also, a letter written in lead pencil, addressed to no one by name, but clearly a testamentary document. *Knox's Estate*, 131 Pa., 220. 19. Since the act of 1848, a will may be executed by the testator making a mark or cross. A witness to a will is not required to know the contents of the paper, nor hear it read to the testator, nor even to know that it is a will, but only that the person signing it declared it to be his act and deed. *Lees' Will*, 19 Phila., 19. 20. A will may be properly executed by a mark. Illiteracy is no bar to testamentary capacity. The act of January 27, 1848, expressly validates the use of the mark or cross. The presence of Latin phrases in the will of an ignorant testatrix is no objection to its validity. *Lees' Estate*, 5 Pa. County, 396. *Flannery's Will*, 24 Pa., 502. *McCarty vs. Hoffman*, 23 Pa., 509. 21. Under the act of January 27, 1848, the execution of a will is valid where the testator affixes his mark thereto, although able to write his name. If, however, the testator's

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name to a will was written at his request and in his presence, and with the intent that he should affix his mark thereto, the execution it seems would not be valid if he failed to so affix it. *Main vs. Ryder*, 84 Pa., 217. 4 W. N., 173. 22. The fact that the subscribing witnesses wrote their names before the testator attached his signature, did not render the execution and attestation insufficient. The English statute of wills is more exacting in its requirements than ours. *Miller vs. McNeill*, 35 Pa., 217. 23. Whatever a testator is shown to have intended as his signature, is a valid signing, no matter how imperfect or unfinished, or fantastical or illegible, or even false, the separate characters or symbols he has used may be when critically examined. The act of 1833 declares that a will shall be signed at the end, unless the testator is prevented from signing by the extremity of his last illness. The act of 1848 permits the testator to make his mark or cross in lieu of signing. Legibility is not a requisite to a signature. In the present case, the testator at the end of his will was only able to make a character which was apparently the first letter of his name. Held, to be a sufficient signature. *Plate's Estate*, 28 W. N., 166. 8 Lancaster Review, 211. 24. Exactly what constitutes a signing has never been reduced to a judicial formula, but barring any sudden incapacity to complete the signature by reason of the extremity of last sickness, the signature should be a full and complete one, according to the intention and understanding of the testator. Execution of a will by a mark can only be by a mark made with the intention of executing the will. *Plate's Estate*, 148 Pa., 55. 25. Where a will and codicil form one instrument, and the former is not signed, and the latter is, the codicil draws the will after it. *Pepper's Estate*, 27 W. N., 513. 26. Where a man, *in extremis*, declares his wishes as to the disposition of his estate, and directs a will to be written from a memorandum taken by some one present from the declarations of the party, and he die before the will is drawn, it is not a nuncupative will, nor can it be probated. *Porter's Appeal*, 10 Pa., 254.

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27. The act of April, 1833, requires, that every will shall be in writing, and unless the testator be prevented by the extremity of his last sickness, shall be signed by him at the end thereof; or by some person in his presence, and by his express direction. Under this act, it was not necessary that the will should be sealed, nor that subscribing witnesses should necessarily prove its execution, nor indeed that witnesses should be present and see it executed, if written by the testator himself. If a man, intending to make a will, is prevented by accident from doing so, equity cannot grant relief. *Stricker vs. Groves*, 5 Wh., 396. 28. Mere proof that a person not interested in the will guided the hand of the testator in signing the will, such aid being knowingly accepted by the testator, in itself is insufficient to defeat the will. *Shotwell's Estate*, 3 Lackawanna Jurist, 405. 9 Lancaster Review, 203. 30 W. N., 292. 29. The signature or mark of the testator must appear at the end of the will. The legislature apparently looked less at the mode of the signature than to its place, which they required to be at the end of the document. *Vernon vs. Kirk*, 30 Pa., 222. 30. Under the act of April 8, 1833, a testator may sign his will by deputy or by mark, when he is unable to write, either from want of education or physical ability, but this method of signing can never be resorted to from caprice or convenience. *Vosburg's Will*, 9 Pa. County, 243. 31. When a will is written with a final clause appointing executors, and the signature of the testator precedes such clause, the will is not signed at the end thereof within the meaning of the act of April 8, 1833, and should not be admitted to probate. *Wineland's Appeal*, 118 Pa., 37. *Baird's Estate*, 35 W. N., 15. 32. The act of April 8, 1833, provides that every will shall be in writing, and unless the testator is prevented by sickness, shall be signed by him at the end thereof, and shall be proved by the oaths or affirmations of two witnesses. Where a scrivener was preparing a will for a dying man to sign, and, before it was ready for examination, death supervened, the will was

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unexecuted. *Wall vs. Wall*, 123 Pa., 545. 33. A will made on Sunday, while the testator was in danger of immediate death, or believed that such danger existed, is valid. The court will presume that such circumstances of necessity existed as to justify the act. *Weidman vs. Marsh*, 4 Clark, 401.

Windows.

I. NEGLECT IN CLOSING. Where land was sold with a house on it, having windows overlooking the adjacent land of the grantor, the latter is not estopped from obstructing the windows, unless they were necessary to give light and air to the house; or if sufficient light and air could be derived from other windows open. *Rennyson's Appeal*, 94 Pa., 152.

II. NEGLECT IN OPENING. An injunction will not be issued to prevent defendant from putting a window in his wall, which would overlook plaintiff's property and destroy its privacy. A different rule applies to party walls in Philadelphia. *Shell vs. Kemmerer*, 2 Pearson, 293.

III. NEGLECT IN THROWING GOODS FROM. Where the occupant of a store directed the servant of another to remove merchandise which had been sold to him by throwing it out of an upper window into the street below, which resulted in injuring a passer-by, held, that the person injured had no right of action against the occupant of the store, the relation of master and servant not existing. *McCullough vs. Shoneman*, 105 Pa., 169.

Witnesses.

I. NEGLECT IN CROSS-EXAMINING. 1. The court, on the trial of a criminal case, may, in its discretion, control the cross-examination of witnesses, by requiring the proposed questions to be reduced to writing and submitted to the court, before being propounded to the witness. The object of this is to keep improper questions from the jury. Witnesses have rights which should be respected even in the quarter sessions and oyer and terminer. *Buck vs. Comm.*, 107 Pa., 491.

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2. Cross-examination must be confined to matters which have been stated in the examination-in-chief, and to such questions as may show bias and interest in the witness; to permit a party to lead out new matter, constituting his own case, under the guise of cross-examination, is often unfair to the opposite party. *Caldwell vs. Anderson*, 104 Pa., 207. 3. A witness' cross-examination must be concluded before other witnesses are examined. *Dunlap vs. Williams*, 11 W. N., 76. 4. While, in Pennsylvania, a party will not be permitted to lead out new matter, constituting his own case, by the cross-examination of his adversary's witness, there is yet not a single case to be found in which the court has reversed on that ground. Where a witness has stated a fact, he may be asked by the other party to detail all the circumstances within his knowledge which qualify it, even though they may constitute new matter and form part of his own case. *Hill vs. Litch*, 1 Lancaster Bar, No. 45. 5. The plaintiff in an equity proceeding was examined in chief before a master, and his testimony reduced to writing. An opportunity was afforded the defendant to cross-examine, but he did not avail himself of it, and before doing so died. A motion was made to strike out the evidence; held, that it was competent and properly admitted. *Hay's Appeal*, 91 Pa., 265. 6. If a defendant be permitted, in the cross-examination of a witness, to lead out new matter, constituting his own case, which he has not yet opened to the jury, to the injury of the plaintiff, it is a sufficient ground for reversal. *Thomas vs. Loose*, 114 Pa., 25. *Denniston vs. Philadelphia Company*, 161 Pa., 42. *Breinig vs. Meitzler*, 23 Pa., 157. *Turner vs. Reynolds*, *Idem*, 199.

II. NEGLECT IN SUBPŒNAING. 1. It is not requisite for a subpœna to be served by a sheriff or constable, in order to be taxed as costs. *Mungan vs. Jones*, 5 Lancaster Review, 216. 2. A party in attendance upon court is privileged from service of process, but a failure to assert the privilege promptly is a waiver of it. *Ruger vs. Keller*, 12 W. N., 371. *Massey vs. Dantum*, *Idem*, 436.

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III. NEGLECT OF COMPETENCY. 1. A witness to be competent to testify must believe in a Supreme Being, and possess a conscience alive to the conviction of accountability to a higher power than human law. Hence, atheists and infidels are incompetent as witnesses. *Comm. vs. Winnemore*, 2 Brewster, 378. 2. The question of the competency of a witness is for the court, not the jury. *East Penna. R. R. vs. Schollenberger*, 1 Walker, 401. 3. If, after he has given testimony, the incompetency of a witness be shown, the court should be asked to strike out his testimony, or to charge the jury that it must be disregarded by them. *Steamboat Dictator vs. Heath*, 56 Pa., 290.

IV. NEGLECT TO ADMIT OPINIONS OF. 1. The admissibility of the opinions of witnesses, expert and other, must always rest in clear necessity. Where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, a witness may be allowed to supplement his description by his opinion. But when the circumstances can be accurately described to the jury, and their bearing on the issue estimated by persons without special knowledge or training, opinions of witnesses are inadmissible. *Franklin Ins. Co. vs. Gruver*, 100 Pa., 266. *Graham vs. Penna. Co.*, 139 Pa., 149. *Beatty vs. Gilmore*, 16 Pa., 463. 2. The rule is well settled that, on a question of testamentary capacity, the opinions of witnesses, when they state facts as the ground of their opinions, are competent evidence. *Shaver vs. McCarty*, 110 Pa., 346.

V. NEGLECT TO ANSWER. 1. It is a contempt of court, for a witness to refuse to answer a pertinent question. *Comm. vs. Higgins*, 5 Kulp, 269. 2. Under the act of May 23, 1887, which provides that a witness need not answer any questions which would tend to criminate him, it is the province of the trial judge to decide whether the answers to questions put will criminate the witness. *Comm. vs. Bell*, 39 Pittsburgh Journal, 91. 3. The legislature can compel witnesses to answer questions, the answers to which may not show them to be crimi-

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nal, but may involve them in shame and reproach. *Comm. vs. Roberts*, Brightly's Rep., 109. 4. A witness cannot refuse to answer a question which may subject him to no other injury than one of a civil nature. *Danforth, In re*, 1 Clark, 31. 5. Where an answer to a question will subject a man to a criminal prosecution, or render him odious in the opinion of others, he is not bound to answer it. Yet the weight of authority is, that when a question put to a witness is relevant to the cause, such witness cannot refuse to answer the inquiry, whatever may be the effect upon his character. *Doran, In re*, 2 Parsons, 471. 6. No witness is compelled to criminate himself, nor by his reply to involve himself in shame or reproach. *State vs. Gibbs*, 3 Y., 429. *Galbreath vs. Eichelburger, Idem*, 515. 7. An objection to answering a question on the ground that it may criminate the witness, must come from the witness, *qua* witness, and not from counsel. *Lusk vs. Callery*, 29 Pittsburg Journal, 261. 2 Schuylkill Record, 281. 8. When a witness, under a deposition, refuses to answer certain interrogatories, the party taking the deposition should certify that fact at the foot of the document. *Magill vs. Kauffman*, 4 S. & R., 317. 9. A witness cannot be compelled to say whether he has committed a crime, notwithstanding a prosecution is barred by the statute of limitations. *McFadden vs. Reynolds*, 35 Pittsburg Journal, 156. 10. When a witness declines to answer a question on the ground of its tendency to criminate himself, the objection is addressed to the court, and not to the jury. *Phelin vs. Kenderdine*, 20 Pa., 354.

VI. NEGLECT TO ATTEND. 1. Persons residing more than forty miles from the place of trial, need not attend as witnesses, but their depositions, regularly taken, may be read at the trial. *Fuller vs. Guernsey*, 24 Pittsburg Journal, 200. 6 Luzerne Register, 152. 2. A witness cannot be compelled to come from a distant county within the state, to give evidence in court, unless upon special grounds laid, such as to identify a person or paper. The court would long hesitate, before awarding an attachment to compel a witness to leave

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his business and travel a long distance to give his testimony, when it might be satisfactorily obtained in a rule for the purpose. *Freiland vs. R. R.*, 2 Pearson, 75. 3. A witness is bound to attend at the instance of either party, until his deposition is closed. *Hook's Estate*, 13 Phila., 390. *Coroner, In re*, 1 W. N., 372. *Ulmar vs. Ryan*, 137 Pa., 302. *Wright vs. Topham*, 2 W. N., 478. 4. When a witness neglects to appear before a magistrate or notary, the proper practice is to obtain a rule of court to show cause why an attachment should not issue. *Trimble vs. Barnard*, 15 W. N., 127.

VII. NEGLIGENCE TO CALL. 1. The physician who examined the person of a girl upon whom the offence of rape was alleged to have been committed, should have been called as a witness by the district attorney. Whether his evidence tended to convict or acquit, it was demanded equally by the cause of humanity or of justice. *Donaldson vs. Comm.*, 95 Pa., 24. 2. When a private writing is not directly in issue, its execution may be proved by any competent testimony, without calling the subscribing witness. *Kitchen vs. Smith*, 30 *Pittsburg Journal*, 364.

VIII. NEGLIGENCE TO CHALLENGE. The objection to a witness is not waived by permitting him to be sworn. It is taken in sufficient time, if made during the trial. *Bank vs. Wikoff*, 2 Y., 39. 4 Y., 47.

IX. NEGLIGENCE TO COMPENSATE. 1. Costs of witnesses subpoenaed in good faith, will not be allowed if called for the purpose of establishing a fact which the court decided was incompetent and irrelevant. *Abel vs. Fisher*, 3 Northampton Co., 68. 2. When witnesses have been called, not for evidence, but only to multiply costs, their fees will not be allowed, but this interposition must be cautiously exercised, so as not to trench upon the rights of parties. *Brubaker vs. Shirk*, 1 Lancaster Bar, No. 25. *Hostetter vs. Festermacher*, 7 *Idem*, 117. 3. The county is not liable for the payment of witnesses on the part of the commonwealth in a prosecution which is ended by the district attorney entering a *nolle prosequi* with

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the leave of the court. *Comm. vs. Torrey*, 1 Schuylkill Record, 298. 4. A party in interest is not entitled to witness fees. Where a witness is neither subpoenaed nor examined, but attends on request, and the case is settled without a trial, the court must be satisfied that the party who procured his attendance did so in good faith, expecting to require his testimony in order to entitle him to costs. In some cases, the certificate of counsel that certain witnesses, naming them, were in their opinion material, will lead the court to confirm the taxation of their fees. *Cameron vs. Crossman*, 4 Pa. County, 316. *Comm. vs. Smith*, *Idem*, 321. *Litz vs. Cauffman*, *Idem*, 329. 5. A party defendant is not entitled to costs as a witness. *Deerwester vs. Hook*, 1 Pa. Dist., 406. 6. Where parties subpoenaed are incompetent to testify, they are no witnesses, and are not entitled to fees or mileage from the adverse party, although they have a claim therefor on the party subpoenaing them. The fees of a witness who is rejected at the trial, cannot be taxed as part of the costs. *Easton Bank vs. Wireback*, 2 Lancaster Review, 274. *Fisher vs. Scott*, *Idem*, 299. *Comm. vs. Worrall*, 3 *Idem*, 7. *Coroner's Inquests, In re*, 3 *Idem*, 70. *Comm. vs. Bitzer*, 3 *Idem*, 78. 7. Fees for witnesses to testify to the character of a party for veracity, in the event that it would be attacked, will not be allowed, in the absence of reasonable ground that it would be attacked, and no attack being made. *First National Bank vs. Broadhead*, 8 Pa. County, 536. 8. A witness in a case in court where he is at the same time a party to a suit in a different case, is not entitled to witness fees. Where two suits are brought against the same defendant and they are tried together, witnesses are entitled to but one compensation. *Beatty vs. R. R.*, 4 Lancaster Review, 1. *Sing vs. Blind*, *Idem*, 313. 9. There is no fixed rule to determine the number of witness that may be summoned by a party, and the witness fees of which shall be paid by the losing party. The court will interfere where manifest oppression is shown, but it will never be presumed. *Union Congregation vs. Strauch*, 2 Schuylkill Record, 102. 10. It would be a dangerous prece-

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dent to sanction the payment of witness fees to a party for witness not only not called, but not present in the court room. *Wright vs. Topham*, 2 W. N., 478. 11. The fees and mileage of witnesses called and examined on behalf of the defendants in trials for felony, cannot be recovered by such witnesses from the county. *Williams vs. Northumberland Co.*, 110 Pa., 48.

X. NEGLECT TO DISCLOSE RESIDENCE. The commonwealth is not compelled to disclose the residences of her witnesses. *Comm. vs. Applegate*, 1 Pa. Dist., 127.

XI. NEGLECT TO EXAMINE. 1. The time and order in which a witness is examined are within the discretion of the court. *Brinks vs. Heise*, 84 Pa., 246. 2. It is the duty of the grand jury to examine all the witnesses marked on the bill of indictment, unless an examination of part satisfies them that there is reasonable cause for finding the bill. *Comm. vs. Ditzler*, 1 Lancaster Bar, No. 12. 3. The successful party cannot recover from the adverse party the fees of a witness who was not examined at the trial, who knew nothing about the case, and who subpoenaed himself, in the absence of good faith. *Cole vs. Howell*, 1 Northampton Co., 151. 4. Fees should be allowed for a witness summoned and in attendance, though not examined, unless it be shown that there was oppression in the production of such witness. *Dellinger vs. Dellinger*, 2 Lancaster Bar, No. 22. *Cleminson vs. Green*, 2 Chester Co., 206. *Rex vs. Piatt*, 3 W. N., 187. *Lagross vs. Curran*, 10 Phila., 140. 5. A witness is entitled to fees for each day that he is in attendance, without regard to the fact of his examination. *Goodman's Estate*, 23 W. N., 235. 6. The court may require counsel to certify upon their honor, that they considered the unexamined witness as material when subpoenaed, before allowing the fees as part of the costs. *Litz vs. Kauffman*, 2 Walker, 227.

XII. NEGLECT TO FIND. The degree of diligence to be shown in the search for a subscribing witness to a paper, is the same as that required in the search for a lost paper. It must be a strict, diligent and honest inquiry and search. On showing

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this, secondary evidence of the execution of the writing may be given. *Gallagher vs. Assurance Co.*, 5 Kulp, 467.

XIII. NEGLECT TO GIVE EXPECTED TESTIMONY. If a witness testifies against the party by whom he is called, it is competent for that party to examine other witnesses to prove he was mistaken, either to rectify the mistake or to prove he told a different story before. *De Lisle vs. Priestman*, 1 Browne, 176.

XIV. NEGLECT TO IMPEACH VERACITY. By producing a witness, a party admits for that case he is credible, but does not admit that everything he says is true. He may contradict his witness or show he was mistaken, but he cannot directly impeach his veracity. *McDermott vs. Hoffman*, 70 Pa., 31.

XV. NEGLECT TO OBEY SUBPŒNA. 1. Sickness, utterly incapacitating obedience to a subpœna, will excuse absence. *Butcher vs. Coats*, 1 D., 340. 2. Upon the refusal of a witness to appear before an examiner, the court on rule granted will issue an attachment. *Bowen vs. Thornton*, 9 W. N., 575. 3. A witness, in contempt, for not obeying a subpœna, can only be punished by fine. A failure of a witness to appear before an examiner, in obedience to a subpœna, is not a contempt of court, but a contempt of the process of the law, for which the examiner is entrusted by the law with power to punish. *Comm. vs. Newton*, 1 Grant, 453. 4. The governor of the state is exempt from the process of the courts whenever engaged in any duty pertaining to his office, and his immunity extends to his subordinates and agents when acting in their official capacity. *Hartranft's Appeal*, 85 Pa., 433. 5. A witness duly subpœnaed within the jurisdiction, is bound to attend even if he be a resident of another state, and, having attended, he is bound to continue in attendance until properly relieved. But the court will not attach him for contempt, if it appears the witness was unduly delayed, or put to unreasonable inconvenience in going to his home or returning to an adjourned session. *Miggett vs. Dittie*, 12 W. N., 570. 6. Where a witness resides at a distance, an adequate

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sum must be tendered him to defray his prospective expenses. He may refuse to bring with him newspapers containing county advertisements, which papers could have been purchased by the party subpoenaing. *Shippen vs. Wells*, 2 Y., 260. 7. Where a witness has been subpoenaed, and failed to obey its summons, the proper legal process is to award an attachment against him, to be served by an official of the court. *United States vs. Montgomery*, 2 D., 335.

XVI. NEGLIGENCE TO OBJECT TO. 1. If an incompetent witness be allowed to testify, without objection, before an auditor, objection cannot afterwards be made to the admission and consideration of his testimony. *Ackerman's Appeal*, 106 Pa., 1. *Perot vs. Harley*, 1 Brewster, 407. 2. An objection to the competency of a witness must be made before he is examined. *Dean vs. Warnock*, 29 *Pittsburg Journal*, 119.

XVII. NEGLIGENCE TO PRODUCE. 1. The absence of a witness from the state, so far as it affects the admissibility of secondary evidence, has the same effect as his death. *Alter vs. Berghaus*, 8 W., 77. 2. Where a rule of court requires, that before the deposition of a witness resident within forty miles can be read, he shall have been duly subpoenaed, the rule will not apply where, from sickness, he is utterly unable to attend. The law does not require impossible things. *Covanhovan vs. Hart*, 21 Pa., 495. 3. If persons indicted keep the state witnesses out of the way, they are not entitled to be discharged, though two sessions have intervened. *Comm. vs. Arnold*, 3 Y., 263. 4. Where a material witness is absent, and after due diligence cannot be produced at the hearing, the justice should grant a continuance. *Dunfee vs. Vargason*, 3 Pa. County, 207. 5. The admittance or rejection of a witness offered after the evidence had been concluded, is a matter of discretion with the court, and is not a subject of error. *Frederick vs. Gray*, 10 S. & R., 182. 6. The testimony of a witness taken on a commission, cannot be read on the trial of the cause, if the witness be within a certain distance of the place of trial, and within the jurisdiction of the court, and able to attend. *Hoffman vs. Kissinger*, 1

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W. & S., 280. 7. Where a witness is living, and within the jurisdiction of the court, evidence cannot be given of what he swore in a former suit between the parties. Evidence of the handwriting of the obligor and witnesses to a bond is not admissible, where one of the witnesses is living in the state, though in a distant county. *Richardson vs. Stewart*, 2 **S. & R.**, 84. *Hautz vs. Rough*, **Idem**, 349. *Petit vs. McAdam*, **Idem**, 420. 8. The best available evidence must be produced, and hence the subscribing witnesses to an instrument must be examined, if accessible, in preference to proof of the handwriting of the maker. *January vs. Goodman*, 1 **D.**, 208. 9. If a witness reside out of the state, what he swore to on a former trial between the same parties, where the same point was in issue, may be given in evidence. His deposition, if it exists, may be read. *Magill vs. Kauffman*, 4 **S. & R.**, 317. *Noble vs. McClintock*, 6 **W. & S.**, 58. *Carpenter vs. Groff*, 5 **S. & R.**, 162. 10. It is not necessary to call all the subscribing witnesses to an instrument of writing to prove its execution. *McAdams vs. Stillwell*, 13 **Pa.**, 90. 11. To prove a lost document, attested by a subscribing witness, the attesting witness must himself be produced, or the omission to do so supplied in the same manner as if the paper itself were produced. *Nash vs. Gilkeson*, 5 **S. & R.**, 352. 12. Under a rule of court, if a witness reside more than forty miles from the court, his deposition may be read, although he was not served with a subpoena. *Pennock vs. Freeman*, 1 **W.**, 401. 13. The question, when a deposition may be read, in consequence of the witness' inability to appear in court, must be referred to the discretion of the court, but the exercise of that discretion is reviewable on error. *Pepper vs. Lodge*, 16 **S. & R.**, 214. *Dietrick vs. Dietrick*, 1 **P. & W.**, 318. *Dennison vs. Fairchild*, 7 **W.**, 310. 14. The deposition of a witness cannot be read in evidence, if the witness himself is in court, when it is presented, and can be called. Evidence by deposition is of secondary character, and will not be received when better evidence exists, and is in the power of a party. *Stiles vs. Bradford*,

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4 R., 400. 15. A mere service of a subpoena on a witness residing within forty miles of the court, will not authorize his deposition to be read in evidence in the cause ; the party must bring him in by attachment, if he can. *Whitesell vs. Crane*, 8 W. & S., 369.

XVIII. NEGLECT TO PRODUCE BOOKS. 1. Parties are not bound to produce books in answer to a subpoena *duces tecum* prior to the trial. *Prestien vs. Sarmiento*, 4 W. N., 89. 2. A subpoena *duces tecum* from a magistrate does not oblige the parties to bring books and papers ; it applies only to a court trial. *Sollers vs. Dunbar*, 1 W. N., 313.

XIX. NEGLECT TO PROTECT. Witnesses often suffer very unjustly from the undue earnestness of counsel, and are entitled to the watchful protection of the court. In the court they stand as strangers, surrounded with unfamiliar circumstances, giving rise to embarrassment, and in common humanity they are entitled to be treated with great consideration as long as they are disposed to be disingenuous. *Elliott vs. Boyles*, 31 Pa., 66.

XX. NEGLECT TO PROVE MATERIAL. A successful party will not be entitled to fees for witnesses who when called for examination were unable to testify to anything material to the issue. Yet a party may subpoena as many witnesses as he thinks necessary, and the court will not interfere unless he is shown guilty of oppression. *Williams vs. LeBar*, 8 Lancaster Review, 182. *Neely vs. Sensendig*, 9 *Idem*, 107.

XXI. NEGLECT TO RECALL. Executors cannot be compelled to produce the attesting witnesses for cross-examination. After witnesses have been permitted to depart, the party calling them in chief cannot be required to bring them back again. *Whitaker's Estate*, 10 W. N., 138.

XXII. NEGLECT TO RECEIVE FEES. Witness fees are not allowed for attorneys practicing in the court. *Smith vs. Ferguson*, 12 W. N., 504.

XXIII. NEGLECT TO REMEMBER FACTS. 1. It is not a valid objection to a deposition, that the witness refers in his testi-

Witnesses—Continued.

mony to a contemporaneous paper, book or memorandum made by himself, and not in evidence, but which he looked at to refresh his memory. *DuBois City Bank vs. Bank*, 114 Pa., 1.

2. It is not uncommon in practice to corroborate the defective memory of a witness, by proof of what was his habit in similar circumstances, as that he never signed as a witness, without seeing the party himself sign or hearing him acknowledge his signature. *Eureka Ins. Co. vs. Robinson*, 56 Pa., 265.

3. Where a witness to an instrument has lost all memory of a transaction, the same rule applies as if he were dead, or out of the state. The presumption, *prima facie*, is that what a witness has attested has taken place in his presence. *Hamsher vs. Kline*, 57 Pa., 397.

XXIV. NEGLECT TO SUBPŒNA. A party who neglects, up to the day of hearing, to take out a subpoena, or resort to the proper legal steps to obtain the attendance of his witness, is not legally entitled to a continuance. *Knight vs. Parry*, 1 Ashmead, 221.

XXV. NEGLECT TO SWEAR. 1. The test of competency is whether the witness believes in a God who will punish him if he swear falsely ; but whether the punishment will be temporal or eternal, inflicted in this world, or in the future state, is immaterial. Nor need he believe in the inspired character of the Bible. *Blair vs. Seaver*, 26 Pa., 274. 2. A witness who, in a court of record, on being ordered to be sworn or affirmed, refuses, is guilty of a contempt, and is punishable by fine and imprisonment. A commissioner or alderman appointed under a rule of a court of record to take depositions, is empowered to imprison a witness who contumaciously refuses to be sworn in order to testify in a cause. But if the commitment be indefinite as to time, the prisoner will be entitled to relief under a writ of *habeas corpus*. The judge, in such case, should discharge the party at once, because his imprisonment, being unlimited, is necessarily wrongful. *Comm. vs. Roberts*, 2 Clark, 340. 3. A Jew in attendance in court on a Saturday, as a witness, refused to be sworn, as that day was his Sab-

Witnesses—Continued.

bath. For this contumacy, he was fined ten pounds. *Stansbury vs. Marks*, 2 D., 213. *Philips vs. Gratz*, 2 P. & W., 412.

XXVI. NEGLECT TO TESTIFY. 1. The costs of witnesses in attendance will be taxed, although they were not called, unless it is shown they were not material. *Comm. vs. Swisher*, 3 Pa. Dist., 662. 2. Under the act of assembly, counsel for the prosecution in a criminal case shall not refer to the fact, that the accused party omitted, neglected or refused to testify. The omission of the defendant to testify shall not create a presumption against him. Where, however, no evidence whatever is produced by the defendant, and no explanation attempted to refute serious charges, the commonwealth may speak in general terms of this omission. *Comm. vs. Elder*, 12 Phila., 589. 9 Lancaster Bar, 103. 3. Witnesses, in attendance at the trial of a cause in obedience to a subpoena, will be allowed witness fees, although not testifying. It seems that the question of the materiality of witnesses will not be considered, except in case of oppression, which, if alleged, must be proved. *Dellinger vs. Dellinger*, 1 Pa. County, 13. *Comm. vs. Worrall, Idem*, 42. 4. Witnesses attending without subpoena, and not called to testify, are entitled to costs where a subpoena has been taken out but they waived its service, and where there was no allegation that their testimony was not needed. *Lagrosse vs. Curran*, 21 Pittsburg Journal, 184. 2 Foster, 155. 5. A witness cannot be compelled to testify to the commission of a crime by himself because, if prosecuted therefore, he can plead the statute of limitations in defence. He is protected against criminating himself in such a manner as to subject himself even to prosecution. The infamy of his crime would be almost as great where he should escape by pleading the statute, as if he were convicted. *McFadden vs. Reynolds*, 20 W. N., 312. 6. It seems that a person may be compelled to testify, though his evidence would operate against his interest in another action. *Nass vs. Vanswearinger*, 7 S. & R., 192. 7. A witness subpoenaed from the court of common pleas to appear before a commissioner appointed by

Witnesses—Continued.

the court of another state to take testimony, must answer all relevant questions, except such as would tend to criminate him, otherwise he is in contempt of court. *Robb's Petition*, 1 Pa. Dist., 640. 8. A party cannot impeach the character of his own witness, or discredit him, by evidence of general bad character. Nor can he discredit him, by proving his contradictory statements upon other occasions, but must be restricted to proving the facts otherwise by other evidence. *Stearns vs. Merchants' Bank*, 53 Pa., 490. 9. For cause shown, the court will order an adverse party to appear and testify, as under cross-examination, under a rule for depositions prior to the trial. *Stockam vs. Vansant*, 17 W. N., 158.

XXVII. NEGLECT TO VERIFY PREVIOUS STATEMENTS.

The credit of a witness may be impeached, by proving that he has made out of court statements different from those to which he testified. This principle in the law of evidence is firmly settled. *Schlater vs. Wimpenny*, 75 Pa., 325.

Workmen.

I. NEGLECT, BY DEFECTIVE WORK. A workman is not responsible, if the defects were occasioned by following the directions of the owner. If a workman purposely makes the work defective, it is such *mala fides* as would prevent a recovery for any portion of the work done. A neglect or refusal to complete the work is also a bar to the recovery. *Wade vs. Haycock*, 25 Pa., 382.

II. NEGLECT OF FELLOW-WORKMAN. Where several persons are employed as workmen in the same general service, and one of them is injured through the carelessness of another, the employer is not responsible. The liability to injury in such cases is but an ordinary risk, against which the law furnishes no protection, but by action against the actual wrongdoer. *Ryan vs. R. R.*, 23 Pa., 384.

Wrecks.

NEGLECT TO REMOVE. The owner of a vessel which has been sunk in navigable waters, and abandoned by him, is under no obligation to remove the vessel, and is not liable for the injury it may cause other navigators. If, however, instead of abandoning the wreck, he retains such possession and control of it as it is susceptible of, he is bound to exercise ordinary diligence and despatch in removing it, or preventing its doing injury to others. And when he attempts to remove the wreck and fails, the inadequacy of the means will not be proof of negligence. *Winpenny vs. Philadelphia*, 68 Pa., 139.

Writ of Error.

I. NEGLECT BY DELAY. A writ of error may be waived by the delay of the party, his omission to apply for relief to the court below, and other circumstances. *Whitehill vs. Whitehill*, 17 S. & R., 295.

II. NEGLECT IN ASSIGNMENTS. 1. The court will not notice assignments of error, unless they are made in conformity with the rules of court. *Brown vs. Brooks*, 25 Pa., *Schwenk vs. Montgomery Co.*, 26 Pa., 281. *Martin vs. Jackson*, 27 Pa., 504. 2. The court will notice an error not assigned, which plainly appears, where the justice of the case requires it. *Anderson vs. Long*, 10 S. & R., 55. *Brown vs. Caldwell*, *Idem*, 114. 3. Where the error assigned is to the charge of the court, the part of the charge referred to must be quoted *totidem verbis*, in the specification. *Hultz vs. Comm.*, 3 Grant, 61. *Brown vs. Brooks*, 25 Pa., 210. *Hutchinson vs. Campbell*, *Idem*, 273. 4. Each error must be assigned particularly and by itself, and no specification shall embrace more than one point or raise more than one distinct question. *Riemer vs. Stuber*, 20 Pa., 458. 5. The failure to assign errors is a waiver of them; and the judgment of the court below will in such case always be affirmed. *Thompson vs. McConnell*, 1 Grant, 396. *Hilling vs. Wilson*, 1 *Idem*, 121. 6. A point not made below, is not the subject of an assignment of error. *Wright vs. Wood*, 23 Pa., 120. *Bull's Appeal*, 24 Pa., 286.

Writ of Error—Continued.

III. NEGLECT TO ATTACH PAPERS. When it appears from the record that deeds, records or other papers material to the case were given in evidence below, and these documents are not annexed to the record, the court will affirm the judgment. *Barton vs. Wells*, 5 Wh., 225.

IV. NEGLECT TO FILE AFFIDAVIT. The affidavit that the writ is not intended for delay must be made before the record is returned; and will not be dispensed with, even if the plaintiff be an administrator. *Beale vs. Patterson*, 6 S. & R., 89. But see *Heckert's Appeal*, 13 S. & R., 104.

V. NEGLECT TO PERFECT BAIL. If bail in error is not perfected within ten days after exception, not only may execution issue from the court below, but the defendant in error is entitled to a *non pros*. *Taggart vs. Cooper*, 3 B., 34.

VI. NEGLECT TO PROPERLY RETURN. By long practice, returns to writs of error have been received after the time to which they were returnable. *Gailey vs. Beard*, 4 Y., 418.

Writ of Inquiry.

I. NEGLECT TO ALLOW. Where a judgment has been taken by default, the common law writ of inquiry to ascertain damages issues. The sheriff alone summons the jury, and the direction of the whole proceeding before the jury is out of the presence of the court. In the present case, judgment was entered against a corporation for want of a plea in a case of negligence. The court made an order in the nature of a writ of inquiry. *McHenry vs. Ry. Co.*, 14 W. N., 404.

II. NEGLECT TO OBTAIN. A writ of inquiry of damages is not necessary, where there has been an award, an appeal from the same and a neglect to plead. *Sharff vs. Stump*, 2 Woodward's Decisions, 441.

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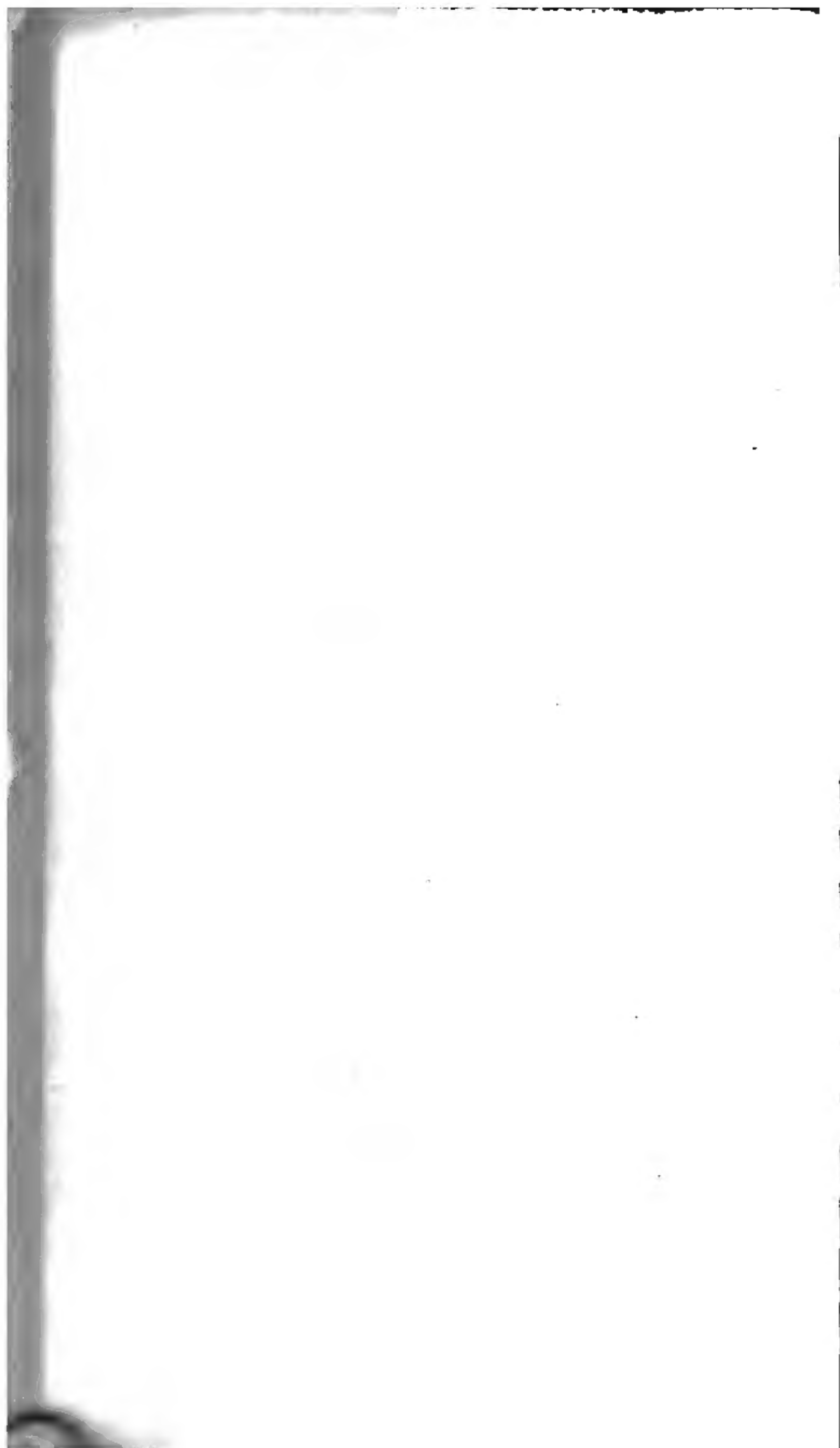
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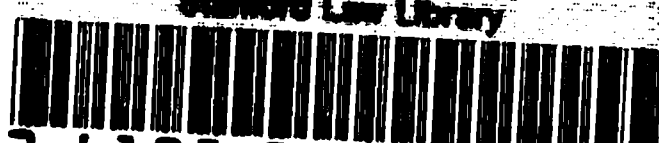
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